(1)

Supreme Court, U.S.
FILED

No. 991631

APR 10 2000

IN THE

Supreme Court of the United States

THE ICELAND STEAMSHIP COMPANY, LTD.—EIMSKIP,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF THE ARMY,
and LOUIS CALDERA, SECRETARY OF THE ARMY,
Respondents,

and

TRANSATLANTIC LINES—ICELAND EHF.
and TRANSATLANTIC LINES LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

JOANNE W. YOUNG
Counsel of Record
LEE H. SIMOWITZ
DAVID M. KIRSTEIN
JENIFER M. BROWN
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
WASHINGTON, D.C. 20036
(202) 861-1500
Counsel for Petitioner

APRIL 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 WASHINGTON, D. C. 20001

127 f/o

QUESTION PRESENTED FOR REVIEW

May a treaty be construed in deference to a unilateral *ex post facto* reinterpretation by the United States, without regard to the contrary interpretation of the text by the other signatory nation, or the intent of the signatories as shown by the treaty's language and legislative history.

PARTIES TO THE PROCEEDING

The Iceland Steamship Company, Ltd.-Eimskip and Van Ommeren Shipping (USA) LLC appeared in the United States Court of Appeals for the District of Columbia Circuit as plaintiff-appellees. The Government of the Republic of Iceland appeared as an *amicus curiae* on behalf of plaintiff-appellees. TransAtlantic Lines-Iceland ehf. and TransAtlantic Lines LLC appeared as defendants (intervenors)-appellants. The United States Department of the Army and Louis Caldera, Secretary of the Army, appeared as defendants-appellees.

The Iceland Steamship Company, Ltd.-Eimskip has no parent corporation. The company is listed on the Icelandic stock exchange. One publicly held shareholder, Sjova-Almennar Ltd., owns more than ten percent of Eimskip's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
BASIS FOR JURISDICTION	2
TREATIES INVOLVED	2
STATEMENT OF THE CASE	2
1. Introduction	2
2. The NATO Base and the 1986 U.S.-Iceland Diplomatic Crisis	3
3. Resolution of the Diplomatic Dispute by the Treaty and MOU	5
4. The Established Course of Conduct in Administering the Treaty and MOU	8
5. The 1998 Contract Awards of Both Portions to a Single Enterprise	8
6. Iceland Objects Diplomatically to the Awards as Violating the Treaty and MOU	10
7. The District Court Litigation, and the U.S. Diplomatic Response	11
8. The Appellate Decision, and Iceland's Renewed Objections	13

TABLE OF CONTENTS—Continued

	Page
REASONS FOR ALLOWING THE WRIT	16
1. The Question Presented Raises Important Issues of the Roles of the Executive and Judicial Branches in Treaty Interpretation	16
2. The U.S. Note Advocated, and the D.C. Circuit Deferred to, an Interpretation that Defeated the Purpose of the Treaty and MOU	19
3. The D.C. Circuit's Decision Far Exceeded the Scope of Proper Deference	20
4. The Texts of the Treaty and MOU Do Not Support the Interpretation Adopted by the D.C. Circuit	22
5. The D.C. Circuit Failed to Consult Any Aid to Interpretation Except the U.S. Note	27
6. The U.S. Note and the D.C. Circuit's Deference to it Violate the Fundamental Obligation to Construe International Agreements in Good Faith	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Air Canada v. U.S. Dept of Transp., 843 F.2d 1483 (D.C. Cir. 1988) 14
Air France v. Saks, 470 U.S. 392 (1985) .. 18, 22, 27, 30
Copperweld Corp. v. Independence Tube Cor. 467 U.S. 752 (1984) 25
Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) 20, 22, 27
El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) 20
Geofroy v. Riggs, 133 U.S. 258 (1890) 25, 29
Hilton v. Guyot, 159 U.S. 113 (1895) 29
Iceland Steamship Co. v. United States Department of the Army, 1999 *U.S. Dist. LEXIS* 1091 (D.D.C. Feb. 3, 1999) ..... *passim*
Iceland Steamship Company, Ltd. v. United States Department of the Army, 201 F.3d 451 (D.C. Cir. 2000) ..... *passim*
Kolovrat v. Oregon, 366 U.S. 187 (1961) 18, 22
Maximov v. United States, 373 U.S. 49 (1963) 19, 28
O'Connor v. United States, 479 U.S. 27 (1986) 22
Rainbow Navigation, Inc. v. Department of the Navy, 620 F. Supp. 534 (D.D.C. 1985) 4
Rainbow Navigation, Inc. v. Department of the Navy, 686 F. Supp. 354 (D.D.C. 1988) 8, 23
Rainbow Navigation, Inc. v. Department of the Navy, 783 F.2d 1072 (D.C. Cir. 1986) 4
Rainbow Navigation v. Department of the Navy, 911 F.2d 797 (D.C. Cir. 1990) 24
Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987) . 28
Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) ..... passim

TABLE OF AUTHORITIES—Continued

Page

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,370 U.S. 19 (1962) 30
Tucker v. Alexandroff,183 U.S. 424 (1902) 29
United States v. Alvarez-Machain, 504 U.S. 655 (1992) 22
United States v. Superville, 40 F. Supp. 2d 672 (D.V.I. 1999)..... 29
United States v. Stuart, 489 U.S. 353 (1989)..... 26, 28
Xerox Corp. v. United States, 41 F.3d 647 (Fed. Cir. 1994), *cert. denied*, 516 U.S. 817 (1995) 25
Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) 20

TREATIES AND STATUTES

28 U.S.C. § 1254(1) 2
Administrative Procedure Act, 5 U.S.C. § 702 (1994) 2
Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994) 4
Competition in Contracting Act, 35 U.S.C. § 3553 (1994) 2
Memorandum of Understanding in Implementation of the Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, T.I.A.S. No. 11,098 (Sept. 24, 1986)..... *passim*
Suits in Admiralty Act, 46 U.S.C. § 741 (1994) 2
Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, T.I.A.S. No. 11,098 (Sept. 24, 1986)..... *passim*
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ..... 19, 29

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989) 17
Restatement (Third) of Foreign Relations Law of the United States (1987).....28, 29
David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994) 17
S. Exec. Rep. No. 99-27 (1986) 6, 26, 28

No. _____

IN THE

Supreme Court of the United States

THE ICELAND STEAMSHIP COMPANY, LTD.—EIMSKIP,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF THE ARMY,
and LOUIS CALDERA, SECRETARY OF THE ARMY,
Respondents,

and

TRANSATLANTIC LINES—ICELAND EHF.
and TRANSATLANTIC LINES LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The Iceland Steamship Company, Ltd.-Eimskip respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 201 F.3d 451 (D.C. Cir. 2000), and is reprinted as Appendix A, 1a *et seq.* The opinion of the United States District Court for the District of Columbia is not reported, and is reprinted at 1999 U.S. Dist. LEXIS 1091 (D.D.C. Feb. 3, 1999) and as Appendix B, 27a *et seq.*

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATIES INVOLVED

This case involves the Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, T.I.A.S. No. 11,098 (Sept. 24, 1986), reprinted as Appendix C at 43a *et seq.*, and the Memorandum of Understanding Between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate Their Defense Relationship, T.I.A.S. No. 11,098 (Sept. 24, 1986), reprinted as Appendix D at 46a *et seq.*

STATEMENT OF THE CASE

1. Introduction

Petitioner, The Iceland Steamship Company ("Eimskip") filed suit against the United States Department of the Army in the United States District Court for the District of Columbia.[1] The basis for Eimskip's claims was the Army's violation of a 1986 Treaty and a related Memorandum of Understanding between the United States and Iceland. These documents were negotiated to serve the economic and security interests of both countries by ensuring equitable participation by both U.S. flag carriers and Icelandic shipping companies in the transport of military cargo to U.S. bases in Iceland. For each contract period, the cargo was to be divided by a competition between all U.S. flag carriers and Icelandic shipping companies seeking awards under the Treaty.

---

[1] The jurisdiction of the District Court was based on the Administrative Procedure Act, 5 U.S.C. § 702 (1994), the Competition in Contracting Act, 35 U.S.C. § 3553 (1994), and the Suits in Admiralty Act, 46 U.S.C. § 741 (1994).

Contrary to the terms of the Treaty and Memorandum of Understanding, in 1998 the Army awarded contracts for the entirety of the traffic to a single enterprise composed of two companies that were commonly owned and controlled, principally by U.S. citizens, and effectively managed by a single individual. The Government of Iceland immediately protested the awards as a violation of the Treaty in a diplomatic note to the United States. The District Court (Hogan, J.) found that the awards, effectively permitting a single enterprise to obtain 100 percent of the cargo, violated the straightforward language of the Treaty and Memorandum of Understanding, requiring a single competition among all bidders. The District Court followed a 1988 decision by the same court (Greene, J.) which held, under the Treaty and Memorandum of Understanding, that awards must be based on a single competition allocating 100 percent of the cargo with the larger share going to the lowest bidder and the remainder to the next lowest bidder from the other country. The District Court granted summary judgment to Eimskip. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that despite the Treaty's requirement of a "competition" between U.S. and Icelandic carriers, both portions of the cargo could be awarded to commonly owned and controlled firms that concededly did not compete with each other. In doing so, the D.C. Circuit deferred entirely to the views of the United States State Department in a diplomatic note of its own delivered in the course of the litigation (which was never part of the District Court record), and ignored the views of the Government of Iceland.

2. The NATO Base and the 1986 U.S.-Iceland Diplomatic Crisis

In 1951, at the request of the North Atlantic Treaty Organization ("NATO"), the United States and Iceland entered into a Defense Agreement under which the United States established a military base in Iceland at Keflavik for

the defense of Iceland and to protect NATO's northern flank and the sea lanes between the United States and its European allies. 50-51a; 55-56a. Iceland granted use of the NATO base (and other military sites) rent-free, but subject to review by either nation at any time. 56a. From the late 1960s until 1984, military cargo needed to supply this strategic base was carried exclusively by established Icelandic-owned and operating shipping companies, because no U.S.-flag ships were available to serve the U.S.-Iceland route. *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1074 (D.C. Cir. 1986), *aff'g* 620 F. Supp. 534 (D.D.C. 1985). In 1984, a newly-formed U.S.-flag carrier was created expressly to serve this route. *Id.* Under the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994), which reserves military cargoes exclusively for U.S. flag vessels, that company was entitled to carry one hundred percent of the military cargo to the NATO base (*id.*), and began to carry as much cargo as its capacity allowed. 620 F. Supp. at 537.

Iceland, an island nation, considered the displacement of the Icelandic shipping companies by the U.S. carrier as a serious threat to its economic and security interests, which depend in large measure on its ocean shipping lines. 48a; 51a; 56a The U.S. carrier's invocation of domestic law to oust the Icelandic shipping companies provoked a diplomatic crisis between the United States and Iceland. The Government of Iceland raised the issue with the State Department no fewer than six times in 1985. The State Department feared the dispute would lead to termination of the lease for the NATO base if the exclusion of Icelandic shipping companies was not rectified. *Rainbow Navigation*, 783 F.2d at 1074. Secretary of State Shultz stated in a declaration filed in the ensuing litigation that the problem had become a "source of significant friction" between the two nations, and that the United States feared "unilateral retaliatory action by the Government of Iceland, affecting military facilities in Iceland upon which we depend." *Id.*

3. Resolution of the Diplomatic Dispute by the Treaty and MOU

In 1986, the diplomatic dispute was resolved by the negotiation and adoption of a "Treaty Between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship" (the "Treaty") as well as a Memorandum of Understanding ("MOU") between the two governments to implement the Treaty. In his transmittal letter submitting the Treaty to the Senate, President Reagan said:

> The Government of Iceland has taken the position that because Iceland's economy and security depend upon its shipping lines, and because of our mutual defense interests, Icelandic lines should have the opportunity to compete for participation in this trade. Iceland's serious concern about this defense issue has been expressed at the highest levels. This Treaty will resolve this matter and will further the cooperation of the United States and Iceland in essential areas of defense.

48a. Secretary Shultz's transmittal letter to the President expressed similar concerns, noting that shipment of Keflavik cargoes on the U.S. carrier "has sharply reduced the transportation of military cargo on Icelandic shipping lines," and as a result, "Iceland has indicated that this matter could affect our longer-term defense relationship, including arrangements for the operation of the base at Keflavik." 50-51a.

The language of the Treaty (Article I) addressed the problem by mandating a "competition between United States flag carriers and Icelandic shipping companies" and stated that "[a]ny such competition shall result in contract awards *that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade.*" 44a (emphasis added). The MOU implemented the Treaty's principle by specifying the signatories' agreement on how the trade was to be divided between U.S. and Icelandic carriers:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of *periodic competitions* between United States flag carriers and Icelandic shipping companies. *Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country, ...*

46a (emphasis added). Article IV of the Treaty also stated that its provisions (as well as those of the MOU) applied notwithstanding any prior inconsistent law or regulation of the United States or Iceland. 45a.

The legislative history of the Treaty and MOU confirmed the intention of both the United States and Iceland to put an end to domination over military cargo to Iceland by a single U.S. firm, and to ensure that a substantial portion of the trade would be carried by established members of the Icelandic shipping industry, as had historically been the case. In particular, the Senate report accompanying the Treaty stated in no uncertain terms that "the United States and Iceland have proceeded with the only alternative reasonably available, *a treaty to divide the trade*." S. Exec. Rep. No. 99-27, at 3 (1986) (62-63a) (emphasis added).

The Preamble to the Treaty itself expressed the same intention:

> Recognizing the need for *equitable participation* by the United States and Iceland in the burdens and benefits of the Defense Agreement;
>
> Taking into account *the historic participation of vessels operating for Icelandic shipping companies* and vessels of the United States in the carriage of military cargo between the United States and Iceland in support

of the defense arrangements established pursuant to the Defense Agreement;

Recognizing that *equitable participation of vessels of both countries* in the carriage of cargoes for purposes of the Defense Agreement will strengthen the relations of the Parties and further mutual cooperation in essential areas of defense;

Acknowledging the vital importance of securing adequate ocean transportation services between Iceland and the United States *with vessels operating for Icelandic shipping companies* and vessels of the United States during the period of the Defense Agreement; . . . .

43-44a (emphases added).

Other elements of the legislative history of the Treaty and MOU reiterated and emphasized the purpose of those agreements: that no carrier of one of the signatories was permitted to dominate (let alone monopolize) the trade, and that established Icelandic carriers would maintain their historic role. For example, Secretary Shultz's transmittal letter to the President said that "*[e]quitable participation by vessels of both countries in the carriage of such cargoes* for purposes of the Defense Agreement will strengthen the relations of the two Parties" (51a), and that annual review of the MOU's provisions would be carried out "with a view to enhancing competition and *ensuring the viability of the carriers of both countries operating in the trade.*" 53a (emphases added). State Department Counselor Edward J. Derwinski testified in Senate hearings that "[u]nder the Treaty, transportation services on the route will be acquired through a competitive bidding process, with provisions to ensure a viable U.S. flag presence *as well as the Icelandic line presence in the Keflavik trade.*" 57a (emphasis added).

4. The Established Course of Conduct in Administering the Treaty and MOU

For twelve years following the adoption of the Treaty and MOU, the consistent practice of the contracting agency was to solicit competing bids, to award one portion of the contract to a U.S. flag carrier, and the other portion to an established Icelandic shipping company. At no time were the two portions of the contract both awarded to firms sharing any ownership connection. The Treaty and MOU foreclosed such an award, particularly the Treaty's language that the contracts must be awarded on the basis of a "competition between United States flag carriers and Icelandic shipping companies" (44a), and the parallel language in the MOU, which also mandated that "[e]ach competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier[.]" 46a. Commonly controlled firms cannot compete with each other.

Shortly after the adoption of the Treaty and MOU, the Navy attempted to segregate the bidding into two separate competitions, one for the 65 percent portion and another for the 35 percent portion. The United States District Court for the District of Columbia, in the litigation that followed, held that such a procedure violated the express terms of the MOU, which requires a "single competition" among all bidders. *Rainbow Navigation, Inc. v. Department of the Navy*, 686 F. Supp. 354, 359-60 (D.D.C. 1988) (Greene, J.).

5. The 1998 Contract Awards of Both Portions to a Single Enterprise

In 1998, when the contract came open for rebidding, six bids were submitted to the Army. Two came from longstanding Icelandic shipping companies, including petitioner Eimskip, the incumbent for the Icelandic portion of the contract. Another was submitted by Van Ommeren, the U.S. incumbent. The other three bids were submitted, in varying forms, by two commonly owned and controlled firms: one by TransAtlantic Lines LLC ("TLL") as a U.S.

bidder, another by TransAtlantic Lines-Iceland ehf ("TLI") as an ostensible Icelandic bidder, and the third by TLL and TLI together as a joint venture. 29a.

As the District Court found in the instant case, "the ownership and management of TLL and TLI are substantially similar." 30a. One person, Gudmundur Kjarnested, a citizen of Iceland (but a resident alien in the United States), was President of one firm and Vice President of the other, effectively managed both of them, and signed the bid documents on behalf of both. At the time the bids were first submitted, TLL was a wholly-owned subsidiary of TLI. During the course of the bid process, a substantial U.S. shipping company, American Automar Inc., became the principal owner of both companies (with 51 percent of TLL's stock and 50 percent of TLI's). The same two individuals (Mr. Kjarnested and Brandon Rose, a U.S. citizen) owned the rest of the stock of both companies (49 percent of TLL's stock through a holding company and 50 per cent of TLI's stock). (One percent of TLL's stock was owned by a relative of Mr. Kjarnested.) 30a. *Compare* 82-83a *with* 84a. The common ownership of the two firms is graphically illustrated at 89a.

It is undisputed that TLL and TLI did not compete against each other for the Keflavik contract. Given (as the District Court subsequently found) that the "two entities . . . are substantially identical" (42a), competition between them was factually and legally impossible. The TLI and TLL bids were thus more than simply collusive; they were submitted by the same person on behalf of what was, in any realistic sense, the same enterprise.

On September 18, 1998, the Army awarded the 65 percent share to TLI, the ostensible Icelandic bidder, and the remaining 35 percent to TLL, its commonly owned and controlled U.S. sister company. 29a. The Army, however, had earlier rejected the TLI-TLL joint venture proposal because it regarded the Treaty and MOU as requiring separate

contract awards, one to a U.S. flag carrier and one to an Icelandic shipping company. The Army evidently saw no obstacle to elevating the form of the Treaty and MOU over their substance: although it awarded two separate contracts, it gave both contracts to firms that were effectively a single enterprise.

6. Iceland Objects Diplomatically to the Awards as Violating the Treaty and MOU

On September 28, 1998, promptly after the contract award, the Government of Iceland sent a diplomatic note to the State Department which stated that the awards to TLL and TLI violated the Treaty and MOU in two respects. 65a. First, the Icelandic note concluded that awarding both portions of the contract to commonly owned and controlled firms violated the requirement of the Treaty and MOU that the awards result from a "competition":

> The Government of Iceland observes that it is the obligation of the Government of the United States of America under the Treaty and Memorandum of Understanding to conduct bona fide competitions between Icelandic shipping companies and United States flag carriers for awards to which the Treaty and Memorandum of Understanding apply. Accordingly, the Government of Iceland interprets the Treaty and Memorandum of Understanding to preclude awards by the Government of the United States of America of both the Icelandic and United States portions of the trade subject to the Treaty and Memorandum of Understanding to affiliated companies under common direction, ownership and/or control.

67a. Second, the Iceland note stated that the award violated the language of the Treaty and MOU requiring an award to "Icelandic shipping companies" capable of "maintain[ing] a viable presence" in the trade:

> [T]he Government of Iceland interprets the Treaty and Memorandum of Understanding to preclude any award of the Icelandic portion of that trade to any company that lacks the experience, technical capability, financial responsibility, and material connection with Iceland that are necessary to ensure, in accordance with the Treaty and Memorandum of Understanding, maintenance of a viable presence of Icelandic shipping companies in that trade providing for the security of Iceland and the equitable participation of Iceland in the benefits of the Defense Agreement, and therefore, is not an Icelandic shipping company for the purposes of the Treaty and Memorandum of Understanding.

67a.

7. The District Court Litigation, and the U.S. Diplomatic Response

Eimskip filed this action in the United States District Court for the District of Columbia on October 30, 1998. Van Ommeren intervened as a plaintiff; TLI and TLL intervened as defendants.

On December 30, 1998, just prior to argument on dispositive motions in the District Court, the State Department issued a diplomatic note in response to the Icelandic note. 69a. As to the "competition" issue, the United States note said that:

> The Government of the United States followed its own contracting rules during the course of this procurement. Under those standards, different bids submitted by divisions of the same corporation or different bids signed by the same person for two companies is permissible and does not constitute collusive bidding when, as was the case here, there is no evidence of an attempt to eliminate competition from other bidders. This standard applies even in cases where two affiliated bidders are jointly preparing and submitting bids for the same requirement. In this case,

> however, the two companies whose relationship is the cause of concern for the Government of Iceland were not competing to fill the same contract requirement. Rather, the Iceland company submitted a proposal for the 65% share while the U.S.-flag company submitted one for the 35% share. . . .

74-75a. As to the "Icelandic shipping company" issue, the U.S. note rejected Iceland's interpretation of that term in the Treaty and MOU, and the associated reference to capability to maintain a "viable presence":

> The Government of the United States notes that none of these four criteria cited by the Government of Iceland to render [TLI] a non-Icelandic shipping company appears in the text of the Treaty or MOU. . . . It is the position of the Government of the United States that none of the terms in the Treaty or MOU require recourse to supplementary means of interpretation when the terms of the treaty are plain and unambiguous.

72a.

On February 3, 1999, the District Court (Hogan, J.) granted the motions for summary judgment filed by Eimskip and Van Ommeren. Finding that TLL and TLI were "substantially identical in ownership and management," the Court held that the coordinated bids by those companies "violate the treaty and MOU." 36a. The Court explained:

> Such coordination defeats the Treaty/MOU requirement of a *single* competition between U.S. and Icelandic shipping companies whereby the lowest overall bidder would get up to 65 percent of the cargo and the next lowest bidder from the other country would get the remainder. The Treaty does not permit two separate competitions, one among Icelandic shipping companies and one among U.S. flag carriers. The idea of a single competition dictates that TLI and TLL compete against each other. Here, they clearly did not.

36a.

The Court cited Judge Greene's holding in the earlier *Rainbow* case, discussed *supra*, (which was never appealed) that the Treaty and MOU require a *single competition*, and in particular his finding that "the Navy's proposal for two separate competitions was contrary to the 'straightforward and unambiguous' language of the Treaty and MOU, which require a single competition dealing with 100 percent of the cargo." Judge Hogan continued: "If the treaty contemplated two competitions, one *among* U.S. carriers and *another* among Icelandic shipping companies, it would have so stated and would not have used 'competition' in the singular." 37a. The Court concluded:

> By allowing related offerors from the two countries to submit coordinated bids, the Army violated the "straightforward and unambiguous" requirement of the Treaty and the MOU that the bidders compete against one another in a single competition.

37a

The District Court did not discuss the U.S. note because it was never made a part of the record. In a hearing shortly afterward on a stay motion, Counsel for the United States told the Court that "[w]e have decided not to include [the U.S. note] in the record, because we felt that was not truly part of the record." 80a. The Court accepted this representation: "I don't think it is." *Id.*

8. The Appellate Decision, and Iceland's Renewed Objections

The United States Court of Appeals for the District of Columbia Circuit reversed. The D.C. Circuit recognized at the outset that the Treaty and MOU "are intended to ensure that the Iceland trade will be shared by United States flag carriers and Icelandic shippers." 4a. The Court also readily acknowledged that TLL and TLI "have substantially similar ownership," that Mr. Kjarnested "principally manage[s]" both companies, and that Messrs. Kjarnested and Rose "were the

primary owners of both companies." 7a. "Despite this close relationship," the Court said, "TLI and TLL are separate corporate entities," citing the fact that the former is a company registered in Iceland and the latter is registered in Delaware as a limited liability company. 7a.

The D.C. Circuit relied largely, if not principally, on the U.S. diplomatic note:

> To the extent that the meaning of treaty terms are [sic] not plain, we give "great weight" to "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement." [quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)] . . . Although "we give somewhat less deference" where an agency and another country disagree on the meaning of a treaty or MOU, where an agency has "wide latitude in interpreting the MOU, . . . we will defer to its reasonable interpretation." *Air Canada v. U.S. Dep't of Transp.*, 269 U.S. App. D.C. 155, 843 F.2d 1483, 1487 (D.C. Cir. 1988).

12a. The Court then stated that it would refer to the U.S. note for "guidance" on both issues before it, although it observed that the note was not part of the District Court record, and that the District Court had not even been made aware of the note when it addressed the treaty issues. 12a.

First, the Court held that there had been a "competition" for the awards within the meaning of the Treaty and MOU:

> The plain meaning of the Treaty and MOU comport with this view, but to the extent the meaning of the word "competition" is in any doubt, it does not prevent bids of separate corporate entities that have common ownership. Therefore, we agree with the U.S. Diplomatic Note that the bidding process was a competition.

13a (footnote omitted). The Court reached this conclusion by reasoning that "[r]egardless of whether TLI and TLL

competed against each other" (13a), they competed with *other* U.S. flag carriers and Icelandic shippers: "Even if TLI and TLL colluded and were not acting independent of each other, the participation of other bidders would meet the definition's requirements." 15a. The Court also relied on domestic procurement law (even though Article IV of the Treaty expressly overrode inconsistent domestic law of both countries), noting that "the Comptroller General allows affiliated companies to submit multiple bids for the same procurement." 14a.

The Court concluded:

> We cannot, in the name of effectuating the purposes of the Treaty and MOU, read into those documents a meaning of "competition" which would prohibit the bids of separate corporate entities with common ownership. To do so would distort the meaning of the term "competition." If TLI and TLL were one corporation, then the entire shipping trade could not be split between them beeausc the Treaty and MOU contemplate two separate awards to one entity of each country. *But TLI and TLL are separate entities, and are entitled to be treated as such.*

16a (emphasis added). The Court's analysis throughout echoed the approach of the U.S. note. The Court concluded: "To the extent that the term admits of any ambiguity, we will defer to the position of the U.S. Diplomatic Note that the bids did not create some unnamed creature that was not a 'competition.'" 16a.

Second, the Court held that TLI qualified as an "Icelandic shipping company" under the Treaty and MOU. Here, the Court's reliance on the U.S. note was near-total: "We can conclude that *whatever the Treaty and MOU require*, the interpretation of the U.S. Diplomatic Note is reasonable and is entitled to deference." 17a (emphasis added). While stating that "[w]e do recognize the concerns of the government of Iceland," because "[a]pparently, when the

Treaty was drafted, it was not contemplated that newly formed Icelandic-owned shipping companies would be able to capture the trade," the Court dismissed those concerns with the statement that "if Iceland wished the limitation it now seeks, it could have insisted that a more specific definition be included." 17a "Insofar as there is any ambiguity," the Court concluded, "we will defer to the reasonable interpretation offered in the U.S. Diplomatic Note." 18a.

The Government of Iceland filed an *amicus* brief in the D.C. Circuit, restating its disagreement with the interpretation of the Treaty and MOU embodied in the contract awards and advocated by the United States and by TLL and TLI in the litigation. The Court never referred to the Iceland *amicus* brief. In particular, the Court did not recognize that Iceland's concern that TLI was not a bona fide "Icelandic shipping company" stemmed not merely from TLI's newness, but from the twin undisputed facts that TLI was substantially U.S.-owned and controlled, and was under common ownership and control with the U.S. awardee. Iceland appended to its brief the declaration of a member of its diplomatic service who had been intimately involved in the negotiation of the Treaty and MOU. The Icelandic diplomat said that in the course of negotiations, "the United States asserted that its procurement law would not permit collusion that would defeat the purpose of the competition and preclude qualified Icelandic shipping companies from participating in the carriage of the cargo."

REASONS FOR ALLOWING THE WRIT

I. The Question Presented Raises Important Issues of the Roles of the Executive and Judicial Branches in Treaty Interpretation.

This case presents the Court with a vitally important issue that the Court has never (to petitioner's knowledge) addressed: whether a court may interpret international agreements in deference to the unilateral, *ex post facto* views of the United States, without regard to the express and

repeated contrary interpretation urged by the other signatory nation, and in a way that utterly defeats the intent and purpose of the agreements.

Noted international law scholars have stressed the constitutional dangers of uncritical deference by the judiciary to the views of the Executive Branch in matters of treaty interpretation:

> There is no intelligible set of principles for determining meaning from treaty texts. All we have, instead, are explicit and prudential demands placed on our judiciary to conform their treaty interpretations to the wishes of the executive branch. Treaty interpretation is bankrupt because of unbridled deference. If we were told that acts of Congress had to be construed in a fashion amenable to the President's whims, we would scoff at this as fundamentally inconsistent with our constitutional scheme of separation of powers and of ordered liberty.

David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 954 (1994).

> [T]he authority to reinterpret treaties would be a powerful tool in the hands of the Executive, allowing a President to revise settled treaty law unilaterally. Such authority is, however, alien to the Constitution, in which the separation of powers guaranties Senate participation in the establishment, as well as in the amendment, of treaty law.

David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1434 (1989).

Here, the D.C. Circuit's unbridled deference to the views of the State Department gave the language of the Treaty and the MOU an interpretation that turned the clock back to 1985. That decision replicated the intolerable situation that had produced a diplomatic crisis and caused Iceland to negotiate those agreements in the first place: the monopolization of

cargo shipments to the NATO base by a single U.S.-controlled enterprise, and the exclusion of the *bona fide* Icelandic shipping industry from that trade. This was precisely the result Iceland had negotiated the Treaty and MOU to avoid. The D.C. Circuit's decision thus violated a fundamental principle of treaty interpretation. "[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the *shared expectations of the contracting parties.*" *Air France v. Saks*, 470 U.S. 392, 399 (1985) (emphasis added).

The D.C. Circuit's misapplication of treaty interpretation principles will have significant adverse consequences for the foreign policy of the United States. The D.C. Circuit's decision allowed the fundamental meaning of the Treaty to be altered, and its purpose to be defeated, by deferring unquestioningly to the unilateral views of the United States expressed thirteen years after the Treaty and MOU were adopted. Those views, and the court's uncritical acceptance of them, upset the settled and long-established expectations of Iceland. "This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect." *Kolovrat v. Oregon*, 366 U.S. 187, 192 (1961).

Such an approach will make it far more difficult for the United States to negotiate treaties. Other nations will justifiably fear that, regardless of how clear the purpose and meaning of a treaty may be when it is signed, that treaty's meaning can be radically and unilaterally altered at any time such a reinterpretation suits the short term interests of the United States. Courts, if they follow the D.C. Circuit's approach here, will abdicate their Constitutional responsibilities by deferring blindly to the reinterpretation of the day, ignoring (as the D.C. Circuit did) not only the other nation's well-founded objections, but every other indicator of the treaty's purpose and meaning.

II. The U.S. Note Advocated, and the D.C. Circuit Deferred to, an Interpretation that Defeated the Purpose of the Treaty and MOU.

In 1984, a U.S. shipping firm had invoked domestic law to dominate carriage of cargo between the U.S. and NATO military bases in Iceland, excluding Icelandic owned and controlled shipping firms from that trade. Iceland and the United States had negotiated the Treaty and MOU in 1986 to resolve the bitter diplomatic dispute that resulted from that event, a dispute that threatened the very existence of the strategic bases in question. In 1998, the U.S. *again* conferred a monopoly in that traffic on a principally U.S. owned and controlled enterprise that *again* ousted established Icelandic firms from participation, *again* in reliance on domestic law

The U.S. Note rationalized this atavistic result, and the D.C. Circuit adopted that rationale as its own. The D.C. Circuit's decision, deferring to the U.S. Note, held that such a result was consistent with the expectations of both nations—the United States *and* Iceland—at the time the Treaty and MOU were executed. To the contrary, Iceland did not, and could not, have intended that the fundamental purpose of those agreements could be defeated merely by elevating corporate form over substance, through the creation of commonly controlled and managed U.S. and Icelandic firms to receive contracts accounting for 100 percent of the trade.

Even if the text of the Treaty and MOU supported such a result (and they do not), a court must look behind the language of a treaty if a purported "plain meaning" approach produces results that the signatories did not intend. "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)). *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art. 32, 1155 U.N.T.S. 331, 340

(authorizing recourse to "supplementary means of interpretation" when construction of text "leads to a result which is manifestly absurd or unreasonable"). This Court has often reiterated its admonition in *Saks* that courts must "give the specific words of a treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) ("'shared expectations of the contracting parties'"); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223 (1996) ("'shared expectations of the contracting parties'"); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 536 (1991) ("shared expectations of the parties").

It could not have been an "expectation . . . shared" by *either* party in 1986 that the unacceptable *status quo ante* could be restored simply by manipulation of corporate form. Iceland obviously had no such expectation; its shipping industry has been as injured by the 1998 contract awards as it was by the 1984 award to a single U.S. carrier. Not even the United States could have had such an expectation. The U.S. goal was to satisfy Iceland's economic and security concerns and to remove the perceived threat to the continued existence of the NATO base. The U.S. cannot have expected that the Treaty and MOU could be interpreted in such a way as to reopen old wounds, and to resurrect a diplomatic dispute with Iceland that both parties thought had been settled.

III. The D.C. Circuit's Decision Far Exceeded the Scope of Proper Deference.

The D.C. Circuit's uncritical acceptance of the State Department's current views here went far beyond the scope of proper deference. As this Court has held: "Respect is *ordinarily* due the *reasonable views* of the Executive Branch concerning the meaning of an international treaty. . . . [where] the Government's construction of [the treaty] is *most faithful to [its] text, purpose, and overall structure*." *Tseng*, 525 U.S. at 168 (emphasis added).

Indeed, in *Sumitomo*, the Court explained why deference is inappropriate to *ex post facto* views of the Executive expressed long after a treaty has been negotiated and ratified. There, two different letters from two different State Department Deputy Legal Advisers took contradictory views of a treaty. The Court said:

> [N]either of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty.

457 U.S. at 184 n.10.

A good reason for limiting judicial deference to newly-minted Executive reinterpretations of treaties is that they can be subject to short-term considerations far removed from the original purpose of the Treaty. Here, the Army doubtless wanted a lower price for transportation of cargo to the NATO Base. The Treaty and MOU, however, had as one of their manifest purposes to compensate Iceland for the burden of granting a long-term, rent-free lease for military bases to the United States, not simply to gain the cargo rate most favorable to the U.S.

Moreover, the record contradicts the D.C. Circuit's generalization that "[a] diplomatic note is an official position of the type which is unlikely to be taken for litigation purposes." 13a. Such matters are hardly immune from political pressure: here, a powerful U.S. Senator, Senator Robert Torricelli, intervened directly with the Attorney General, the Secretary of State, the Secretary of Defense, and the Secretary of Transportation in an attempt to convince them to adopt positions favorable to TLL and TLI. 85-88a. Here as well, the U.S. note materialized just before the District Court's decision, so late that the Government represented (and the District Court accepted) that it should not even be part of the record. 80a.

Judicial deference to Executive treaty reinterpretations is particularly questionable where, as here, the other signatory to a treaty directly and forcefully contests the U.S. view. Iceland not only objected to the U.S. interpretation of the Treaty and MOU in its own diplomatic note of September 28, 1998 (and others), but pressed those views before the D.C. Circuit in an *amicus* brief. The Court below, however, ignored Iceland's views. This was error, for the "opinions of our sister signatories" are "entitled to considerable weight." *Saks*, 470 U.S. at 404. *See also Floyd*, 499 U.S. at 550 ("We must also consult the opinions of our sister signatories in searching for the meaning of [a treaty term].").

Significantly, in cases in which this Court has deferred to the views of the United States on a question of treaty interpretation, the views of the United States have been congruent with the views of the other nation signatories. *See O'Connor v. United States*, 479 U.S. 27, 32 (1986) (interpretations of U.S. and Panama were consistent); *Sumitomo*, 457 U.S. at 185 (U.S. and Japan agreed on interpretation); *Kolovrat v. Oregon*, 366 U.S. 187, 194-195 (1961) (U.S. and Yugoslavia agreed on treaty interpretation). Here, by contrast, the views of the United States and Iceland are directly opposed and expressed in official notes from both nations' foreign ministries. "That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation." *United States v. Alvarez-Machain*, 504 U.S. 655, 686-87 (1992) (Stevens, J., dissenting) (footnotes omitted).

IV. The Texts of the Treaty and MOU Do Not Support the Interpretation Adopted by the D.C. Circuit.

The D.C. Circuit held that the "plain meaning" of the key term, "competition," in the Treaty and MOU permitted the award of both portions of the contract to the TLL/TLI combination (13a), even though those commonly owned and controlled companies manifestly could not compete with each

other. There are a number of reasons why the D.C. Circuit's "plain meaning" analysis is faulty, not the least of which is this Court's holding in *Sumitomo* that not even "[t]he clear import of treaty must compete against each and every other bidder language" can control where the "obvious meaning" of the text "effects a result inconsistent with the expectations of its signatories." 457 U.S. at 180 (quotations omitted).

At the most basic level, the "plain meaning" of "competition" hardly accords with the D.C. Circuit's construction. The Court said:

> [N]othing in the Treaty and MOU suggests . . . that each and every bidder. . . .
>
> In fact, that has never been the nature of the competition. Because bidders may bid for between 35 percent and 65 percent of the trade, each has never competed against all.

13-14a. But two District Courts—Judge Greene in *Rainbow Navigation*, 686 F. Supp. at 359-60, and Judge Hogan in the instant case, concluded that the "straightforward and unambiguous" language of the Treaty and MOU requires the opposite: a single competition in which each must, indeed, compete against all. 37a. Judge Greene found (and Judge Hogan agreed) that the Treaty mandated a single competition, in which the lowest bidder receives the share up to 65 percent share, while the "next lowest bidder" of the other country receives the "remainder," *i.e.*, the share up to 35 percent. *Id.* In this case, contrary to the Treaty's requirement, there never was a "next lowest bidder" from the other country, and the "remainder" language was read out of the Treaty.[2]

---

[2] As Judge Greene explained, the Treaty is violated:

> by having two competitions rather than one; once the lowest bidder from one country wins the contract for 65% of the cargo, instead of the remainder going to the next lowest bidder, a second competition is held for that remainder at which, again, the next lowest bidder prevails. With respect to neither competition will the "next lowest

(continue)

The United States itself interpreted the Treaty and MOU language differently in its brief to the D.C. Circuit in 1990: "[T]he Treaty simply provides for 'competition' *between* 'United States flag carriers and Iceland shipping companies' for the right to transport military cargo to Iceland. . . . The single competition under the Treaty is just that—a *competition* based on bidded rates for carriage." 77-78a.[3] Of course, the Government of Iceland repeatedly interpreted the meaning of the competition requirement to mean the opposite of what the D.C. Circuit deemed its "plain meaning." Indeed, even the U.S. note does not support the D.C. Circuit's "plain meaning" analysis: the U.S. note makes a plain meaning argument with regard to the "Icelandic shipping company" language of the Treaty and MOU, but in construing the "competition" term, the State Department relied on U.S. procurement law, not the asserted plain meaning of the term in the text. *Compare* 72a *with* 74-75a. Thus, the "plain meaning" that the D.C. Circuit found in the term, "competition," has simply not been obvious to other courts, the U.S. Government, or the Government of Iceland.

Like the U.S. note, the D.C. Circuit relied on domestic procurement law for the proposition that affiliated companies

---

(continued)

> bidder" even be considered: it would have to be the lowest bidder in the second competition to receive any portion of the award.

686 F. Supp. at 360. As the District Court found in the instant case, each bidder may bid for (and potentially receive) as much of the trade as it wishes, up to the ceilings specified by the Treaty and MOU. Other than the ceilings, there is no prescribed share for either country.

[3] The D.C. Circuit itself interpreted the Treaty differently in the 1990 litigation, even though competition between U.S. and Icelandic carriers was not directly at issue, when it described the Treaty and MOU as requiring "*a competition* among U.S.-flag and Icelandic carriers and *guarantees* to merchant mariners of each country a minimum share of that trade." *Rainbow Navigation v. Dept. of the Navy*, 911 F.2d 797, 798 (D.C. Cir. 1990) (emphasis added).

may bid for the same procurement, and agreed "that the existence of affiliation does not negate the presence of 'competition' in the usual sense of the word." 15a. But there are other meanings of "competition" in domestic law. Most prominently, commonly owned subsidiaries do not "compete" with each other for purposes of the antitrust laws. As this Court has held, entities under common ownership "have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).[4]

Most tellingly, however, there is no indication that the United States and Iceland intended to incorporate domestic U.S. procurement law into the Treaty and MOU. Indeed, their intention was exactly the opposite: Article IV of the Treaty expressly states that "[t]he provisions of this Treaty and any implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States of America or the Republic of Iceland." 45a. "[I]n their construction words [in a treaty] are to be taken in their ordinary meaning, as understood in the public law of nations, and *not in any artificial or special sense impressed upon them by local law*, unless such restricted sense is clearly intended." *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (emphasis added). "A treaty, when ratified, supersedes prior domestic law to the contrary, . . . and is equivalent to an act of Congress." *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

---

[4] Evidently recognizing the narrowness of its conception of "competition," the D.C. Circuit noted in an aside that it had "no occasion to consider whether appellants' behavior would or would not constitute 'competition' within the meaning of the antitrust laws." 13a, n.4.

The United States and Iceland created their own ground rules for the "competition" in the Treaty and MOU for what the Senate Report on the Treaty called "a unique solution to a unique problem." 61a. The purpose of those international agreements, as the Senate Report also expressly stated, was to solve a vexing diplomatic problem by "the only alternative reasonably available, *a treaty to divide the trade*" (62-63a; emphasis added), not simply to obtain the best price from the lowest qualified bidder, the object of a routine procurement competition.[5] It is simply irrelevant that ordinarily, as the D.C. Circuit said, "affiliated companies [are allowed] to submit multiple bids for the same procurement." 14a. This was no ordinary procurement.

In short, the plain language of the Treaty and MOU supports Iceland's interpretation that the term "competition" provided the very mechanism by which the signatories guaranteed that a single enterprise from one nation could not monopolize the entire trade. Because commonly controlled enterprises cannot "compete" with each other, that language prevented replication of the unacceptable conditions that prompted the Treaty in the first place. The very least that can be said is the "competition" term admits of such a construction, especially given the purpose of the Treaty and MOU. "[G]iven that a treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' and that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States v. Stuart*, 489 U.S. 353,

---

[5] The Army acknowledged this when it disqualified the joint venture proposal submitted by TLL and TLI as inconsistent with the terms of the Treaty and MOU. 7a, n.2. Such a joint venture proposal would have been perfectly acceptable in an ordinary government procurement; the Army's rejection of that proposal here demonstrated that the Army knew that the ground rules were different here, and controlled by international agreements rather than domestic procurement law.

368 (1989) (quoting *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)).

V. The D.C. Circuit Failed to Consult Any Aid to Interpretation Except the U.S. Note.

The D.C. Circuit ignored *all* of the customary aids to treaty interpretation other than the U.S. note. This was error. *See Saks*, 470 U.S. at 396 ("to ascertain [a treaty's] meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943)); "Nontextual sources that often assist us in 'giving effect to the intent of the Treaty parties' . . . such as a treaty's ratification history and its subsequent operation." *Stuart*, 489 U.S. at 367 (including Senate reports and President's message). As we have explained, the D.C. Circuit ignored a principal aid to interpretation: the views of Iceland, the other nation that signed these bilateral agreements. The Court ignored other recognized sources of interpretation as well.

The D.C. Circuit failed to consider the purpose of the Treaty and MOU: to divide the trade. Instead, it read the key terms of the agreements ("competition" and "Icelandic shipping companies") in isolation from what both Iceland and the United States attempted to accomplish at the time the agreements were negotiated. Treaties, however, must be interpreted in a way "consistent with the primary purpose of the contracting parties[.]" *Floyd*, 499 U.S. at 546.

The D.C. Circuit failed to consider the Treaty's preamble, which is replete with references that stress the parties' intent that members of Iceland's established shipping industry should be assured a substantial share of the traffic as partial compensation for Iceland's rent-free provision of military facilities to the United States. The preamble spoke of "the need for *equitable participation* by the United States and Iceland in the burdens and benefits of the Defense Agreement," of "the *historic participation of vessels*

operating for Icelandic shipping companies and vessels of the United States," of "*equitable participation of vessels of both countries* in the carriage of cargoes for purposes of the Defense Agreement," and of "the vital importance of securing adequate ocean transportation services between Iceland and the United States *with vessels operating for Icelandic shipping companies* and vessels of the United States[.]" 43-44a (emphases added). The preamble of a treaty is a frequent source of guidance for interpretation of the rest of the text. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 534 (1987); *Maximov v. United States*, 373 U.S. 49, 54 (1963).

The D.C. Circuit failed to consider the Senate Report on the Treaty, particularly the report's emphatic statement that "the only alternative reasonably available [was] a treaty *to divide the trade*." 62-63a (emphasis added). The "indication that . . . the Senate ascribed a particular meaning to the treaty is relevant." *Stuart*, 489 U.S. at 367, quoting Restatement (Third) of Foreign Relations Law of the United States § 314, Comment d (1987).

The D.C. Circuit failed to consider the consistent contracting practice subsequent to the adoption of the Treaty, which divided the traffic between a U.S. carrier and an unaffiliated, established Icelandic carrier. "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *Stuart*, 489 U.S. at 369.

Finally, the D.C. Circuit failed to consider the testimony of one of the principal Icelandic negotiators of the Treaty and MOU, in the form of a declaration attached to Iceland's *amicus* brief. The negotiator testified that Iceland expressed concerns about the very result that has now occurred, only to be assured by the U.S. side that the text of the Treaty and MOU as advocated by the United States, and the effect of U.S. procurement law, would forbid such an outcome. *See*

Xerox, 41 F.3d at 654 (giving "weight" to "the recollections of the persons principally involved").

VI. The U.S. Note and the D.C. Circuit's Deference to It Violate the Fundamental Obligation to Construe International Agreements in Good Faith.

Finally, the interpretation advanced in the U.S. note and adopted by the D.C. Circuit is squarely at odds with the fundamental principle that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," Vienna Convention, Art. 26, a principle also known as *pacta sunt servanda*. *See also* Restatement § 321. Moreover, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . . " Vienna Convention, Art. 27.

Nearly a century ago, in *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902), this Court expressed a compelling, and enduring, rationale for construing international agreements liberally and in good faith, holding that a treaty

> should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out is manifest purpose. . . . [Treaties] should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity [between nations], so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence.

The underlying thrust of this bedrock principle of treaty interpretation is to "secure equality and reciprocity" between independent nations. *Geofroy*, 133 U.S. at 271-72. Indeed, "[r]eciprocity is the foundation of international law." *United States v. Superville*, 40 F. Supp. 2d 672, 676 (D.V.I. 1999) (*citing, inter alia, Hilton v. Guyot*, 159 U.S. 113, 228 (1895)).

The U.S. note, and its uncritical acceptance by the D.C. Circuit, fell far short of the obligation to carry out international agreements in good faith. A stark example was

the Court's treatment of the "Icelandic shipping company" language in the Treaty and MOU. While paying lip service to "the concerns of the government of Iceland," the D.C. Circuit dismissed those concerns with a remark redolent of *caveat emptor*: "[I]f Iceland wished the limitation it now seeks, it could have insisted that a more specific definition be included." 17a. Treaties, to the contrary, must be "construed more liberally than private agreements[.]" *Saks*, 470 U.S. at 396.

The same dismissive attitude infected the D.C. Circuit's construction of the "competition" language in the agreement: "But TLI and TLL are separate entities, and are entitled to be treated as such." 16a. This was elevation of form over substance, pure and simple; as the District Court found (and the D.C. Circuit did not question), TLI and TLL are "two entities that are substantially identical." 42a. As this Court has said in a different context, the law should not impose "grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, Co.*, 370 U.S. 19, 29 (1962).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joanne W. Young
Counsel of record
Lee H. Simowitz
David M. Kirstein
Jenifer M. Brown
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500
Counsel for Petitioner

April 2000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 18, 1999 Decided January 11, 2000

No. 99-5088

THE ICELAND STEAMSHIP COMPANY, LTD.—EIMSKIP AND VAN OMMEREN SHIPPING (USA) LLC,
Appellees

v.

THE UNITED STATES DEPARTMENT OF THE ARMY AND LOUIS CALDERA, SECRETARY OF THE ARMY,
Appellees

TRANSATLANTIC LINES—ICELAND EHF. AND TRANSATLANTIC LINES, L.L.C.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02631)

Before SENTELLE, HENDERSON and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* HENDERSON.

SENTELLE, *Circuit Judge*: Appellants TransAtlantic Lines—Iceland ehf. ("TLI") and TransAtlantic Lines, L.L.C. ("TLL") are affiliated corporations and awardees of military shipping contracts for shipping between the eastern United States and Iceland. They appeal from an order of the district court allowing summary judgment in favor of appellees, Iceland Steamship Company, Ltd.—Eimskip ("Eimskip") and Van Ommeren Shipping (USA) L.L.C. ("Van Ommeren"), and requiring the U.S. Army to rebid the contracts. The district court required rebidding on two grounds: First, it held that a 1986 treaty entered into between the United States and Iceland prohibited the award of the contracts to appellants because of their affiliation with each other. Second, the district court held that the contracting officer's determinations of responsibility for appellants were arbitrary and capricious in that she failed to follow relevant solicitation procedures. Applying the deferential standard of review of executive branch decisions which govern in both these contexts, we reverse the district court and uphold the Army's award.

I. Facts

A. Overview

While the interpretation of an international treaty is implicated in this action, this is essentially a disappointed bidder case. *Cf. Elcon Enters., Inc. v. Washington Metro. Area Transit Auth.*, 977 F.2d 1472 (D.C. Cir. 1992); *CACI, Inc.—Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983). At stake are government contracts for shipping between the eastern United States and Iceland. Appellants were awarded the contracts on September 18, 1998, by the United States Army's Joint Traffic Management Office of the Military Traffic Management Command ("Army"). Appellees were losing bidders and the incumbent carriers on these contracts. Disappointed bidders may challenge a government contract award under the Administrative Procedure Act ("APA"), which empowers courts to set

aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994); see *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

B. History

This action is the latest in a series of disputes over the military shipping contracts for trade between the United States and Iceland. We will briefly review the history of this trade and the earlier disputes to provide context for the current case.

The United States has maintained formal arrangements for the use of military facilities in Iceland since at least 1951, when the two countries entered into a defense agreement. *See* Defense Agreement Pursuant to the North Atlantic Treaty ("Defense Agreement"), May 5, 1951, U.S.—Ice., 2 U.S.T. 1195. Prior to 1984, Icelandic shippers traditionally serviced the U.S. military's Keflavik Air Base in Iceland. In that year, Rainbow Navigation, a newly formed United States flag carrier, took over the trade by invoking the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994). That statute requires that American military supplies be carried by U.S. flagged vessels if available. *See Curran v. Laird*, 420 F.2d 122, 127-28, 133 (D.C. Cir. 1969).

The government of Iceland asked that Icelandic shippers be given some accommodation in order to maintain Iceland's good defense relationship with the United States. At first, the U.S. Navy tried to disqualify Rainbow by invoking an exception in the Cargo Preference Act for excessive rates, but this was rejected as based on insufficient evidence. *See Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1073, 1080-81 (D.C. Cir. 1986). The Navy then tried to "dispense with Rainbow's services by a diversion of the cargo . . . to military aircraft," but the District Court rejected this tactic. *Rainbow Navigation, Inc. v. Department of the Navy*, 686 F. Supp. 354, 355 (D.D.C. 1988) (reviewing prior challenges).

Realizing that the Cargo Preference Act was a formidable barrier, the United States (through the State Department) and Iceland negotiated a treaty and memorandum of understanding in 1986. These documents are intended to ensure that the Iceland trade will be shared by United States flag carriers and Icelandic shippers. Article I of the treaty provides:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the percentage of cargo transported . . . by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

Treaty to Facilitate Defense Relationship ("Treaty"), Sept. 24, 1986, U.S.—Ice., T.I.A.S. No. 11,098, at 3. The memorandum of understanding fleshes out how this competition should proceed:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of periodic competitions between United States flag carriers and Icelandic shipping companies. Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be car-

> ried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country . . . .

Memorandum of Understanding in Implementation of the Treaty to Facilitate Defense Relationship ("MOU"), Sept. 24, 1986, U.S.—Ice., T.I.A.S. No. 11,098, at 2. The MOU is to be reviewed yearly and may be amended upon mutual agreement of the parties at any time. *See id.* at 3.

Upon ratification of the Treaty, Icelandic shippers were able to claim back some of Iceland trade. In fact, the Icelandic shippers got back 65 percent of the trade. Although the MOU does not guarantee this allocation, Icelandic shipping companies have much lower costs than U.S. flag carriers, *cf. Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 569 (D.C. Cir. 1982), and generally will be able to submit lower bids than their American competitors. Therefore, in light of this economic reality, the lowest bidder among Icelandic shipping companies will generally be awarded 65 percent of the trade, and the lowest bid from a U.S. flag carrier will be awarded the remainder.

We interpreted the Treaty and MOU in *Rainbow Navigation, Inc. v. Department of the Navy*, 911 F.2d 797 (D.C. Cir. 1990). Rainbow Navigation claimed that the Treaty and MOU, supplemented by legislative testimony on the ratification of the Treaty, required a bidding process protecting Rainbow by including restrictive specifications to disqualify small domestic supply boats. It also contended that the solicitation must include a provision ensuring it could recover the fixed costs of operating a vessel which could carry 65 percent of the trade even if awarded only 35 percent. *See id.* at 801. We rejected the theory that Rainbow should be accorded any greater protection than other U.S. flag carriers, seeing nothing in the language of the Treaty or MOU requiring such a result. We summarized the requirements of the Treaty and MOU:

> By its terms, the Treaty and the MOU require only (1) that the [government] award contracts by means of a com-

petition; (2) in a manner that "ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade"; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo.

Id.

C. Present Controversy

This brings us to the present controversy. On January 30, 1998, the Army[1] issued a solicitation for the Iceland trade, specifically stating that awards would be allocated "[p]ursuant to the Treaty and its implementing Memorandum of Understanding." Of course, the solicitation stated numerous other requirements for bidders to meet. Those we mention here are relevant to appellees' non-treaty related challenges. The solicitation required the Contracting Officer to make an "affirmative determination" of offeror responsibility. It cited to Federal Acquisition Regulation ("FAR"), Subpart 9.1 on Responsible Prospective Contractors, which mandates that an awardee "[h]ave adequate financial resources to perform the contract, or the ability to obtain them." 48 C.F.R. § 9.104-1(a) (1998). The solicitation also stated that each offer should "include sufficient evidence to establish control or irrevocable right to gain control of the necessary vessels in sufficient time to commence service on [the contract start date]."

The solicitation stated that offers were due on March 5, 1998, and the contracts had a proposed starting date of May 1, 1998 because the prior contracts were set to expire on April 30, 1998. Due to delays in the bidding process, the proposed start date was

---

[1] Although the Navy handled the administration of the bidding process in the past, *see, e.g., Rainbow*, 911 F.2d at 799, this responsibility was transferred at some point to the Army, who administered this solicitation through the Joint Traffic Management Office of the Military Traffic Management Command.

moved back to November 1 and the incumbent carriers given a six month extension.

TLI and TLL each submitted bids.[2] TLI and TLL have substantially similar ownership and are principally managed by Gudmundur Kjaernested, who is a citizen of Iceland and United States resident. At the time the original bids were submitted, Kjaernested and Brandon C. Rose, a United States citizen, were the primary owners of both companies. Despite this close relationship, TLI and TLL are separate corporate entities. TLL is a limited liability company registered in Delaware, and TLI is an Icelandic company registered in Iceland.

The Army announced the awards on September 18, 1998. TLI, the Icelandic company, was the lowest overall bidder and the Army awarded it a contract covering 65 percent of the trade. The Army awarded TLL a contract for the remaining 35 percent because it was the lowest bid among U.S. flag carriers.

The Contracting Officer also made the required determination that each company was a responsible contractor. As to TLI, the Contracting Officer cited a bank letter tentatively approving a $1 million credit line to TLL. This letter noted the bank's prior history with TLI and TLL stockholder Brandon Rose as being important in setting up the line of credit. The Contracting Officer also had a letter from Kjaernested stating that the credit line was available to both TLI and TLL. As to TLL, the Contracting Officer's responsibility determination concluded that TLL had "the necessary equipment and facilities to perform this contract." Before the officer were four letters from marine companies pledging vessels, with varying levels of specificity.

---

[2] We are referring to separate bids that TLI and TLL submitted. TLI and TLL also submitted two other bids which were rejected because they were in the nature of joint venture proposals.

Eimskip and Van Ommeren filed protests with the U.S. Government Accounting Office ("GAO"). Under the Competition in Contracting Act, this action automatically stayed the awards. *See* 31 U.S.C. § 3553(b)-(d) (1994). On October 23, 1998, approval to override the stay was granted by the Assistant Secretary of the Army. Eimskip then filed this suit in the district court causing the GAO to dismiss the bid protest. *See* 4 C.F.R. § 21.11 (1997). TLL, TLI, and Van Ommeren timely intervened.

During this same period, the government of Iceland sent a diplomatic note to the U.S. Department of State protesting the awards. Citing the Treaty and MOU, Iceland stated two problems it had with the awards to TLI and TLL: (1) that as commonly owned companies, TLI and TLL could not be awardees, and (2) that TLI was not a true Icelandic shipping company. Specifically, the note stated:

> The Government of Iceland has concluded, based on available information, that [TLI and TLL] are affiliated companies under common direction, ownership and/or control of Icelandic citizens, and that [TLI] lacks the necessary experience, technical capability, financial responsibility, and material connection with Iceland.
>
> . . . .
>
> . . . [T]he Government of Iceland interprets the Treaty and [MOU] to preclude awards by the [Army] of both the Icelandic and United States portions of the trade subject to the Treaty and [MOU] to affiliated companies under common direction, ownership and/or control.
>
> . . . [T]he Government of Iceland interprets the Treaty and [MOU] to preclude any award of the Icelandic portion of that trade to any company that lacks the experience, technical capability, financial responsibility, and material connection with Iceland that are necessary to ensure . . . maintenance of a viable presence of Icelandic shipping companies in that trade providing for the security of Ice-

> land and the equitable participation of Iceland in the benefits of the Defense Agreement . . . .

Iceland Ministry of Foreign Affairs, Diplomatic Note to the Department of State of the United States of America (Sept. 28, 1998), Joint Appendix ("J.A.") 124, 126 ("Iceland Diplomatic Note").

The U.S. State Department issued a diplomatic note on December 30, 1998 in response to Iceland's position:

> The Government of the United States considers its actions in the recent competition and award of the Icelandic military cargo contract are fully consistent with the Treaty and MOU.
>
> . . . .
>
> . . . Until the recent contract competition, the Government of Iceland has not expressed any views regarding the qualifications of particular Icelandic companies nor informed the Government of the United States that it held views that appear to the United States to go beyond the plain meaning of the words themselves.
>
> . . . .
>
> . . . The Government of the United States notes that none of [the] four criteria cited by the Government of Iceland to render [TLI] a non-Icelandic shipping company appears in the text of the Treaty or MOU.
>
> . . . .
>
> It is the position of the Government of the United States that none of the terms in the Treaty or MOU require recourse to supplementary means of interpretation when the terms of the treaty are plain and unambiguous. . . . Iceland, consistent with its obligations under international law, is of course free to enact specific statutory or regulatory criteria for "Icelandic shipping companies" should it wish to do so

(just as the internal law of the United States provides specific criteria for "U.S. flag vessels").

. . . .

. . . [T]he Government of Iceland [has] expressed its concern that there had been no effective competition because of the relationship between two of the bidders. The Government of the United States, however, followed its own contracting processes in this procurement and believes that the goal of competition was indeed met. . . .

. . . [T]here is no evidence of an attempt to eliminate competition from other bidders . . . . [T]he two companies . . . were not competing to fill the same contract requirement. Rather, the Iceland company submitted a proposal for the 65% share while the U.S.-flag company submitted one for the 35% share. . . .

Since the portion of the cargo trade which would be reserved for Icelandic interests was determined on the basis of competition between offers submitted by entities from each country, it is the view of the United States that any relationship between Icelandic companies and companies operating U.S.-flag vessels was and is irrelevant to the fact that there was full, vigorous, and open competition in full compliance with the Treaty and MOU.

U.S. Department of State, Diplomatic Note to the Embassy of the Republic of Iceland (Dec. 30, 1998), J.A. 128, 128-35 ("U.S. Diplomatic Note").

Meanwhile, appellees' district court action was proceeding. Appellees challenged the award on two primary grounds which are before us on appeal. First, they claim that the Treaty and MOU prohibited awards to TLI and TLL for the same reasons cited by the Iceland Diplomatic Note: (1) because the common ownership of TLI and TLL made the bidding process something other than a competition and (2) because TLI is not a true "Ice-

landic shipping company." Appellees also make two challenges to the Contracting Officer's responsibility findings: (1) that TLI was a financially responsible contractor, and (2) that TLL was responsible in that it had a vessel ready to perform.

After initially denying a motion for a preliminary injunction, the district court granted appellees' motions for summary judgment on February 3, 1999, and ordered the Army to cancel the contracts and rebid. The court first ruled that the ownership status of TLL and TLI defeated the MOU's requirement of a single competition for the Icelandic trade. The court also found that the Army's decisions under the solicitation procedures were arbitrary and capricious on both counts. The district court was not yet aware of the recently-issued U.S. Diplomatic Note addressing the treaty issues.

TLL, TLI, and the Army appealed the judgment of the district court. We granted a stay pending appeal. The Government of Iceland submitted an amicus brief on behalf of the losing bidders. The Army originally dismissed its appeal, but has asked leave to file a brief which addresses only the treaty issues.[3]

Addressing the treaty issues first, we conclude that the Army's contract awards to TLL and TLI do not violate the plain language of the Treaty and MOU. As to the responsibility determinations of the Contracting Officer, the context of which requires an especially deferential version of arbitrary and capricious review, we determine that the Army's actions were permissible.

---

[3] The Army's brief does not address the responsibility determinations of the Contracting Officer. At oral argument the Army clarified that it has not changed its position on these issues but has simply chosen not to appeal the district court's decision.

II. Treaty Issues

A. Standard of Review

When interpreting a treaty or memorandum of understanding, we are guided by principles similar to those governing statutory interpretation. We "must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). At this level, "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

To the extent that the meaning of treaty terms are not plain, we give "great weight" to "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement." *Sumitomo*, 457 U.S. at 184-85; *see also In re Papandreou*, 139 F.3d 247, 252 n.2 (D.C. Cir. 1998). Although "we give somewhat less deference" where an agency and another country disagree on the meaning of a treaty or MOU, where an agency has "wide latitude in interpreting the MOU, . . . we will defer to its reasonable interpretation." *Air Canada v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1487 (D.C. Cir. 1988).

In this case, we deem it proper to refer to the U.S. Diplomatic Note for guidance as to the meaning of the terms "competition" and "Icelandic shipping companies" under the Treaty and MOU, although the Note was not in the record before the district court. Although the Army may have considered the Note confidential, TLL and TLI apparently had access to it since they presented it to this court at the time of the initial application for temporary restraint. We would not, of course, consider evidence offered to support a factual proposition which had not been before the district court. However, the Diplomatic Note is not offered as evidence to support a factual proposition, but rather as an interpretive guide for our use in making a legal interpretation. And

although all parties refer to the Note in their briefs, appellees do not object to those references, or our consideration of the Note, on the ground that it was not in the record below. Because it is important for this court to have the guidance of the agency responsible for negotiating this treaty, we consider the Note along with the Army's arguments adopting the same views. A diplomatic note is an official position of the type which is unlikely to be taken for litigation purposes, and is entitled to deference. *Cf. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996).

B. Competition

Having reviewed the applicable principles guiding our reasoning we proceed to the issue of whether the affiliated status of TLI and TLL transformed the bidding process into something other than a "competition." We hold that there was still a "competition" under the Treaty and MOU. The plain meaning of the Treaty and MOU comport with this view, but to the extent the meaning of the word "competition" is in any doubt, it does not prevent bids of separate corporate entities that have common ownership. Therefore, we agree with the U.S. Diplomatic Note that the bidding process was a competition.[4]

On a surface level, a "competition" certainly occurred between U.S. flag carriers and Icelandic shippers. TLI and TLL were competing against other U.S. flag carriers and Icelandic shippers. Regardless of whether TLI and TLL competed against each other, nothing in the Treaty and MOU suggests, as appellees contend, that each and every bidder must compete against each and every other bidder.

In fact, that has never been the nature of the competition. Because bidders may bid for between 35 percent and 65 percent of

---

[4] We have no occasion to consider whether appellants' behavior would or would not constitute "competition" within the meaning of the antitrust laws.

the trade each has never competed against all. Because TM was effectively vying for the 65 percent portion and TLL for the remainder, perhaps it can be said they were not in head to head competition. But the same can be said for Eimskip and Van Ommeren and all the other bidders. Eimskip, being an Icelandic shipper, and Van Ommeren, a U.S. flag carrier, were not in direct head to head competition either. The bottom line is that this conception of a "full competition" has nothing to do with the affiliation of bidders. Under the appellees' theory, a competition could not occur unless each and every bidder requested 100 percent of the trade. The Treaty and MOU do not require such 100 percent bids.

On a deeper level, a form of head to head competition does occur between all bidders. Every bidder is submitting bids in a single competition to award the shipping trade. All the bids must be compared in the first instance to determine who is the overall lowest bidder. Even though TLL and Van Ommeren (or other U.S. flag carriers) have little chance of being the lowest overall bidder, they still compete against everyone else. In this portion of the competition, even TLI and TLL's bids are stacked against each other.

While appellees object to the substantially common ownership of TLI and TLL, it is worth noting that the Comptroller General allows affiliated companies to submit multiple bids for the same procurement. In *Pioneer Recovery Sys., Inc.*, B-214878, 1984 WL 46915, at *2 (Comp. Gen. Nov. 13, 1984), the Comptroller General stated that "[the general rule is that multiple bids may be accepted unless such multiple bidding is prejudicial to the interests of the government or other bidders in which case it is clear that the reason for multiple bidding was not legitimate." *See also David I. Abse*, 51 Comp. Gen. 403, 404-06 (1972) (upholding award where high and low bids were signed by same person of affiliated companies). While the Comptroller General's opinion is not binding precedent, we

agree that the existence of affiliation does not negate the presence of "competition" in the usual sense of that word.

The language of the Treaty and MOU does not define "competition" in any peculiar way requiring a different result. There is "nothing in the Treaty . . . clearly prohibit[ing] a relationship between the two awardees." *Iceland Steamship Co. v. United States Dep't of the Army*, slip op. at 4, No. 98-2631 (D.D.C. Nov. 10, 1998) (order denying preliminary injunction). The Treaty contemplates awards "on the basis of competition between United States flag carriers and Icelandic shipping companies," and the MOU uses similar language. Neither document addresses a situation in which a U.S. flag carrier and Icelandic shipping company have similar ownership.

Appellees argue that the dictionary definition of competition precludes affiliates from bidding. Black's Law Dictionary, for example, describes "competition" as "[t]he effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms." BLACK'S LAW DICTIONARY 257 (5th ed. 1979). But this is exactly what all the bidders, including TLI and TLL, did. Even if TLI and TLL colluded and were not acting independent of each other, the participation of other bidders would meet the definition's requirements. Appellees' "plain meaning" argument therefore fails.

We note that the suggestion of collusion (as opposed to mere affiliation) could be cause for concern. It might be called "unfair competition," but even that term admits that a "competition" occurs. And there is a mechanism for protecting against collusive bidding. A Certificate for Independent Price Determination ("CIPD") certifies the independent development of a bid. Appellees raised a CIPD issue before the district court, but have not pressed it on appeal.

In *Maximov v. United States*, 373 U.S. 49 (1963), a petitioner similarly sought to impose a meaning on a term that it could not

bear. Under the Income Tax Convention between the United States of America and the United Kingdom, Apr. 16, 1945, 60 Stat. 1377, 1384, capital gains of a "resident of the United Kingdom" were exempt from taxation by the United States. *See id.* at 49. The petitioner was trustee of a trust created under Connecticut law by a grantor who was a resident of the United Kingdom. A trust was considered a person under the law of both countries and thus a "resident" of the United States, not the United Kingdom, under the treaty. Petitioner urged that the purpose of the treaty required the opposite result. The Supreme Court disagreed. Reviewing the plain language, the Court could not construe the treaty to effect "so significant a deviation from normal word use or domestic tax concepts." *Id.* at 52.

This case is not unlike *Maximov*. We cannot, in the name of effectuating the purposes of the Treaty and MOU, read into those documents a meaning of "competition" which would prohibit the bids of separate corporate entities with common ownership. To do so would distort the meaning of the term "competition." If TLI and TLL were one corporation, then the entire shipping trade could not be split between them because the Treaty and MOU contemplate two separate awards to one entity of each country. But TLI and TLL are separate entities, and are entitled to be treated as such. Therefore, we conclude that the Treaty and MOU requirement of a "competition" does not foreclose bids from affiliated companies. To the extent that the term admits of any ambiguity, we will defer to the position of the U.S. Diplomatic Note that the bids did not create some unnamed creature that was not a "competition."

C. Icelandic Shipping Companies

Our disposition of the meaning of "competition" does not end our discussion of the Treaty. We must also consider whether TLI is an "Icelandic shipping company." As a preliminary point, we make clear that this dispute is not whether TLI is a properly registered Icelandic company, although it appears to be one.

Instead, we are asked to decide whether it is an "Icelandic shipping company" as that term in used in the Treaty and MOU. While it could be said these two inquiries, absent other direction, should be identical, we need not decide that issue. We can conclude that whatever the Treaty and MOU require, the interpretation of the U.S. Diplomatic Note is reasonable and is entitled to deference.

The Iceland Diplomatic Note suggests that all Icelandic shipping companies must fulfill four requirements: "experience, technical capability, financial responsibility, and material connection with Iceland." How much of any of these factors is required? The Note says sufficient "to ensure a viable presence of Icelandic shipping companies" in the trade. Unfortunately that is not helpful given that the term "Icelandic shipping company" is used in the "definition" itself. Whichever Icelandic shipping company is awarded the contract will have a viable presence. As the district court feared, this is not a meaningful way for a court to analyze what constitutes an Icelandic shipping company within the meaning of the Treaty. *See Iceland Steamship Co. v. United States Dep't of the Army*, slip op. at 6 n.2, No. 98-2631 (D.D.C. Feb. 3, 1999).

We do recognize the concerns of the government of Iceland. Apparently, when the Treaty was drafted, it was not contemplated that newly formed Icelandic-owned shipping companies would be able to capture the trade. Thus a specific definition of the term was not included. Just as Rainbow Navigation was formed as a U.S. flag carrier in 1984 to capture to the entire trade under the Cargo Preference Act, TLI was founded by an Icelandic citizen in an attempt to capture the Icelandic portion under the regime established in 1986. However, if Iceland wished the limitation it now seeks, it could have insisted that a more specific definition be included. For example, the U.S. portion of the trade is reserved for "U.S. flag carriers" instead of "U.S. shipping companies."

The parties to the international agreements included no explicit definition. We have no authority for engrafting terms onto the MOU that they did not include. The plain meaning of the words "Icelandic shipping company" does not compel us to find as a matter of law that TLI does or does not qualify for such status. Insofar as there is any ambiguity, we will defer to the reasonable interpretation offered in the U.S. Diplomatic Note. We therefore hold that it was reasonable for the Army to find that TLI is an Icelandic shipping company under the Treaty and MOU.

Because we need only decide the case before us, we do not identify a line between actions that are permitted and those which are prohibited by the Treaty and MOU. We recognize that a reasonable range of choices might exist. There is no call for us to go further.

III. Solicitation Issues

A. Standard of Review

Finally, we consider the challenges to the Contracting Officer's responsibility determinations. Because of the special nature of contracting determinations, our review is an especially deferential application of the arbitrary and capricious standard. We clarified the application of the standard to contracting determinations in *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980):

> As stated in *Keco Industries, Inc. v. United States*, 492 F.2d 1200, 1203 (Ct. Cl. 1974), the ultimate standard is "whether the Government's conduct was arbitrary and capricious toward the bidder-claimant." Concerning a determination of nonresponsibility, the court in *Keco Industries* specifically stated that contracting officers "have very wide discretion," and that a complaining bidder "would normally have to demonstrate bad faith or lack of any reasonable basis in order to prevail." *Id.* at 1205. In describing the rea-

> sonable basis test, the court elsewhere noted that, "although based on external facts and circumstances rather than a showing of animosity toward plaintiff or favoritism for a competitor, this principle is not far removed from the bad faith test; courts often equate wholly unreasonable action with conduct motivated by subjective bad faith." *Id.* at 1204.

Old Dominion, 631 F.3d at 960; *see also YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 387-88 (1993).

As in other agency review contexts, "a procurement decision is not 'irrational' simply because we might have reached a different decision in the first instance." *Elcon Enters.*, 977 F.2d at 1478. But we look for no more than "substantial compliance with applicable law and baseline substantive rationality [because] '[j]udges are "ill-equipped to settle the delicate questions involved in procurement decisions." ' " *Id.* at 1479 (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984) (quoting *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1271 (5th Cir. 1978))).

Applying this deferential standard, we conclude that a rational basis existed for the responsibility determinations of the Contracting Officer.

B. TLI

Although various challenges were advanced below, appellees' primary argument is that the Contracting Officer should not have relied on a tentative letter of credit to one company—TLL—in finding another—TLI—to be financially responsible. While the basic proposition is appealing, on the specific facts before us we cannot hold that the officer acted improperly. The line of credit letter relied on was addressed to Mr. Rose at TLL, a stockholder of both companies, and stated that the line of credit was based on the bank's relationship with Mr. Rose's family. TLI also provided written assurance to the Army that the letter of credit applied to both companies. And while the letter

of credit applied to both companies. And while the letter was "tentative," it does not state what "tentative" means.

Viewing the totality of the evidence, we hold that the Army had a rational basis for finding TLI to be responsible. In fact, before the district court, the Army even suggested that the Contracting Officer could have found that no line of credit was needed at all. *See Iceland Steamship Co. v. United States Dep't of the Army*, slip op. at 13 n.9, No. 98-2631 (D.D.C. Feb. 3, 1999). This suggestion highlights the difficulty of second-guessing the Contracting Officer's determination. We have no basis for requiring that a letter of credit be more than "tentative." And while the fact that the letter of credit was addressed to TLL might be troubling, the ultimate weight given to this piece of information is based on a discretionary weighing of financial risks and rewards by the Contracting Officer.

Furthermore, it is in an agency's self-interest to make proper responsibility determinations. Otherwise, the agency runs the risk of contractor default which could cause "substantial delay and inconvenience." *Keco Indus.*, 492 F.2d at 1206. But in any event, considering the deferential standard of review applied to this type of decision, and the fact that judges are not financial advisors to the United States government, we conclude that there is no basis for overturning the Contracting Officer's finding that TLI was responsible.

C. TLL

Appellees challenge the Contracting Officer's responsibility determination regarding TLL on the ground that TLL presented insufficient evidence to show a right to control a vessel. The solicitation required "sufficient evidence to establish control or irrevocable right to gain control of the necessary vessels in sufficient time to commence service on [the contract starting date]." TLL submitted four letters from marine companies pledging the availability of vessels. For example, the letter from Tidewater Marine stated:

> This is to confirm that [TLL] has the option to charter the supply boat *Native Dancer*. . . . The maximum charter shall not exceed 180 days. Additional unspecified options shall be mutually negotiated.
>
> The purpose of the charter is to fulfill a part of [TLL's] obligation to the Joint Traffic Management Office, in the event that the company is awarded the contract.

J.A. at 216. Based on these submissions, the Contracting Officer concluded that TLL would obtain the ships necessary to be a responsible contractor.

Deferring to the expertise of the Contracting Officer in these matters, we find this decision to be rational. We have no occasion to weigh the quantum of evidence needed to establish the legal requirements of an irrevocable option. Considering these letters, we cannot say it was arbitrary for the Contracting Officer to decide that TLL would be able to obtain vessels. Moreover, we note that we have held in a contract action that an irrevocable option can be created despite a paucity of stated terms. *See Ammerman v. City Stores Co.*, 394 F.2d 950, 954-55 (D.C. Cir. 1968). Although the letters apparently did not state price terms, we have no information on the typical evidence required by contracting officers, or furnished by prospective charterers. Therefore, we must conclude that the appellees have not established that the Contracting Officer's decision was arbitrary or capricious.

IV. Conclusion

For the reasons set forth above, we conclude that the Army's decision to award the shipping contracts to TLI and TLL does not require rebidding. Because there are no issues of material fact to be decided, we reverse the judgment of the district court and remand for the entry of summary judgment in favor of appellants.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in part and dissenting in part:

The majority rightly focuses on our narrow standard of review of the Contracting Officer's two responsibility determinations. Although its focus is blurred by the quotation from *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 960 (D.C. Cir. 1980), discussing an ill-defined "reasonable basis test," Maj. Op. at 18, in the end my colleagues adhere to the well-established arbitrary and capricious standard of review of administrative action. *See id.* at 18, 20 ("[O]ur review is an especially deferential application of the arbitrary and capricious standard."); *id.* at 18 ("[T]he ultimate standard is 'whether the Government's conduct was arbitrary and capricious.' ") (quoting *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980)).

In any event, even with "an especially deferential application" of an already deferential standard of review, *id.*, we are nevertheless obligated to review the administrative decisions with some scrutiny. The Army regulations mandate that contracts "be awarded to[] responsible prospective contractors only." *See* 48 C.F.R. § 9.103(a). My review of the Contracting Officer's decision leads me to reject his determination of TLI's financial responsibility. In addition, although I concur in the majority holding regarding the Contracting Officer's determination of TLL's operational responsibility, I cannot agree that our standard of review intends nothing more than rubber-stamping the same.

I.

The regulations governing the financial responsibility determination mandate that a bidder provide information "clearly indicating" it has, or can obtain, adequate financial resources to

perform the contract.[1] 48 C.F.R. § 9.103(b) ("In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility."); *see id.* § 9.104-1 ("To be determined responsible, a prospective contractor must . . . [h]ave adequate financial resources to perform the contract, or the ability to obtain them."). Evidence of a prospective contractor's ability to obtain required resources "normally consists of a commitment or explicit arrangement." *Id.* § 9.104-3(a). Moreover, the regulations consider affiliated entities like TLL and TLI separately for the purpose of determining financial responsibility. *See id.* § 9.104-3(c).[2]

The majority concludes that there is no basis to overturn the Contracting Officer's finding that TLI was financially responsible. *See* Maj. Op. at 19. His determination was based on a letter from the State Bank of Long Island purporting to extend a tentative line of credit. As the majority notes, *see id.*, the letter was addressed to Brandon Rose, a stockholder in both TLI and TLL. The majority, however, omits that it was addressed to Rose at TLL. Moreover, the letter extended nothing to Rose and nothing to TLI; it merely "tentatively approved" a line of credit to TLL. JA 313. One of the bases for the bank's decision was its relation-ship with Rose's family. The bank also cited TLL's

---

[1] The solicitation here provided:

> The Government shall require a showing of financial and operational responsibility prior to making an award. The applicable provisions of the FAR [Federal Acquisition Regulation], Sub-part 9.1 require that prior to award, an affirmative determination be made by the Contracting Officer that the prospective offeror is responsible and meets the minimum standards specified herein.

Joint Appendix (JA) 107-08.

[2] Section 9.104-3(c) provides that "[a]ffiliated concerns . . . are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility."

business plan and made no reference to TLI. Perhaps the State Bank of Long Island would not extend credit equally to an entity like TLI, organized under the laws of another country. Perhaps TLI's financial status or business plan was not as sound as TLL's. I also wonder if the letter "clearly indicat[ed]" the prospect of a line of credit for other companies Rose owned stock in.[3]

Even assuming the letter bears on the determination of TLI's financial responsibility, the letter approved the line of credit only "tentatively." JA 313. The majority discounts the conditional nature of the approval because the letter "does not state what 'tentative' means." Maj. Op. at 19. Indeed. the letter did not detail what conditions must be satisfied before the bank in fact extended credit. But "tentative" means "subject to change or withdrawal" or otherwise "not final." Webster's Third New International Dictionary 2357 (1981). The majority also claims: "We have no basis for requiring that a letter of credit be more than 'tentative.' " Maj. Op. at 19. On the contrary, the standards that govern award of a procurement contract (the FAR, Sub-part 9.1, discussed above) plainly envision that a bidder provide more than a tentatively approved line of credit to an affiliated entity. *See* 48 C.F.R. § 9.103(b) ("In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.").

Because the letter from the bank neither "clearly indicat[ed]" applicability to TLI nor extended credit to anyone, I would conclude that the Contracting Officer's determination of TLIs

---

[3] Although TLL provided the Contracting Officer a letter of assurance that the credit applied equally to both companies, TLL did not purport to be speaking for the bank. *See* JA 187. In any event, the regulations provide that affiliated entities are to be considered separately. *See* 48 C.F.R. § 9.104-3(c).

financial responsibility was especially arbitrary and capricious and that he was bound to "make a determination of nonresponsibility." *Id.*

II.

The majority omits review of the Contracting Officer's operational responsibility determination regarding TLL. The Army's solicitation mandates that "[n]o offer will be considered for award which does not include sufficient evidence to establish control or irrevocable right to gain control of the necessary vessels in sufficient time to commence service on [contract starting date]." JA 102. Because TLL proffered no evidence "establish[ing] control," our review focuses on whether TLL proffered sufficient evidence establishing "an irrevocable right to gain control." *Id.* The majority notes that the Contracting Officer relied on four letters from marine companies pledging the availability of vessels to TLL. It concludes that "[w]e have no occasion to weigh the quantum of evidence needed to establish the legal requirements of [an] irrevocable option." Maj. Op. at 20. I disagree. First, while the majority is no doubt correct that, as a general rule, "judges are ill-equipped to settle the delicate questions involved in procurement decisions," *id.* at 18, the determination of an "irrevocable right to gain control" requires a legal conclusion and, thus, a conclusion which judges are presumably adept at making. Moreover, the solicitation provides that an "irrevocable right" is a prerequisite to the operational responsibility determination, JA 102; therefore, finding a bidder to be responsible without an irrevocable right is arbitrary and capricious. In reviewing the Contracting Officer's responsibility determination under any formulation of the arbitrary and capricious standard, then, we must consider whether the four letters TLL submitted were sufficient to establish an "irrevocable right to gain control of the necessary vessels." JA 102.

Because I believe the four letters could constitute an irrevocable option, see *Ammerman v. City Stores Co.*, 394 F.2d 950

(D.C. Cir. 1968); *see generally Restatement (Second) of Contracts* (1979) § 87(2) ("An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."); 3 Eric Mills Holmes, *Corbin on Contracts* § 11.7 (rev. ed. 1996) ("[A]n option contract can be made binding and irrevocable . . . by subsequent action . . . by the option holder in reliance on the option."), I join the majority in deferring to the Contracting Officer's determination that the letters constituted "sufficient evidence" to establish an "irrevocable right to gain control of the necessary vessels in sufficient time to commence service," JA 102, and that TLL was therefore operationally responsible.

Accordingly, I concur *in toto* in Parts I and II and in Parts III.A and III.C as explained above. I respectfully dissent from Part III.B. My resolution of Part III.B, finding reversible error in the award to TLI, would require remand to the Army for rebidding.

APPENDIX B

[Filed Feb. 3, 1999]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civ. No. 98–2631(TFH)

THE ICELAND STEAMSHIP COMPANY, ET. AL.,
Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF THE ARMY,
Defendant.

MEMORANDUM OPINION

A. Introduction

The Iceland Steamship Company ("Eimskip") and Plaintiff-Intervenor Van Ommeren Shipping (USA) L.L.C. ("Van Ommeren") have brought suit pursuant to the Administrative Procedure Act against the United States Department of the Army alleging that the decision of the Joint Traffic Management Office of the Military Traffic Management Command ("JTMO") to award a contract to Defendant-Intervenors Transatlantic Lines, L.L.C. ("TLL") and Transatlantic Lines-Iceland ehf. ("TLI") should be set aside because it was arbitrary, capricious, an abuse of discretion or otherwise unlawful. There are six dispositive motions pending before the Court: (1) The government's Motion to Dismiss Eimskip's complaint; (2) Eimskip's Motion for Summary Judgment; (3) Van Ommeren's Motion for Summary Judgment; (4) The government's Cross-

Motion for Summary Judgment against Eimskip; (5) The government's Cross-Motion for Summary Judgment and Motion to Dismiss against Van Ommeren; and (6) TLL and TLI's Cross-Motion for Summary Judgment against Van Ommeren. The Court held a hearing on these motions on January 7, 1999. Based on the argument at that hearing, and the Court's review of the administrative record and the numerous briefs filed in this case, the Court will grant Plaintiffs' Motions for Summary Judgment and will order that the government cancel the present contract and rebid the Solicitation at issue. The other motions will be denied.

B. Background

This case concerns the award of a government contract for the carriage of military goods and service members' personal property between the continental United States and the Naval Air Station in Keflavik, Iceland. According to the Treaty Between the United States and the Republic of Iceland to Facilitate Their Defense Relationship ("the Treaty") and the implementing Memorandum of Understanding Between the United States and the Republic of Iceland ("the MOU"), the contract is to be shared between Icelandic and U.S. shipping companies. Article I of the Treaty provides:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between

> vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

That agreement, the MOU, provides the details for the shared allocation of transportation services:

> Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of periodic competitions between United States flag carriers and Icelandic shipping companies. Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country.

The Solicitation for the contracts at issue, Solicitation Number N00033-97-R-6611, was issued on January 30, 1998. Two contracts were to be awarded under the Solicitation, one to a U.S. flag vessel operator, and one to an Icelandic shipping company. Six entities submitted offers: (1) Van Ommeren, a U.S. company and the U.S. incumbent; (2) Eimskip, an Icelandic company and the Icelandic incumbent; (3) Samskip ehf, an Icelandic company; (4) TLL, a U.S. company; (5) TLI, an Icelandic company; and (6) TransAtlantic Lines Iceland, TransAtlantic Lines, LLC, a joint venture between TLI and TLL. JTMO determined that the TLI/TLL joint venture was ineligible for an award, because of the interpretation by the Icelandic government that the Treaty and MOU prohibited an award to an Icelandic shipping company using a U.S. flag vessel. On September 18, 1998, after issuing a Determination of Responsibility for TLI and TLL, JTMO awarded the 65 percent share of the trade to TLI and the 35 percent portion to TLL. Eimskip was

the second-lowest offeror for the 65 percent share as was Van Ommeren for the 35 percent share.

The ownership and management of TLL and TLI are substantially similar. Gudmundur Kjaernested, a resident of the United States and a citizen of Iceland, is the Vice President and principal manager of TLI and the President and principal manager of TLI. He effectively manages both companies and signed most of the documents submitted in response to the Solicitation on behalf of both TLL and TLI. At the time the initial offers were submitted, TLL was a wholly owned subsidiary of TLI. Subsequently, American Automar, Inc. bought 51 percent of TLL's stock. The remaining 49 percent is owned by TAL Holding Company, which is owned equally by Brandon Rose and Gudmundur Kjaernested. TLI has substantially the same ownership as TLL: it is 50 percent-owned by American Automar, 24.5 percent-owned by Brandon Rose, 24.5 percent-owned by Gudmundur Kjaernested, and one percent-owned by Simon Kjaernested.

On September 28, 1998, the Icelandic Government sent a diplomatic note to the United States Department of State voicing its disapproval of the contract awards.

> The government of Iceland has concluded, based on available information, that [TLI] and [TLL] are affiliated companies under common direction, ownership and/or control of Icelandic citizens, and that [TLI] lacks the necessary experience, technical capability, financial responsibility, and material connection with Iceland. . . . the Government of Iceland interprets the Treaty and [MOU] to preclude awards by the Government of the United States of America of both the Icelandic and United States portions of the trade subject to the Treaty and [MOU] to affiliated companies under common direction, ownership and/or control.

The letter concludes that TLI "is not an Icelandic shipping company for the purposes of the Treaty and [MOU]."

After the contracts were awarded to TLL and TLI, Eimskip and Van Ommeren filed timely protests with the U.S. Government Accounting Office ("GAO"). In accordance with the Competition in Contracting Act, the proposed awards to TLL and TLI were automatically stayed. *See* 31 U.S.C. § 3553 (c) and (d). On October 23, 1998, JTMO sought and was granted approval from the Assistant Secretary of the Army to override the statutory stay and proceed with the contract award notwithstanding the pendency of the protest. The present action before this Court was filed on October 30, 1998 and, upon notification, the GAO immediately dismissed the pending protest pursuant to 4 C.F.R. 21.11.

C. Discussion[1]

In its Motion for Summary Judgment, Eimskip argues that the award of the Icelandic portion of the contract to TLI violates the Treaty and MOU in several ways: (1) the award to TLI deprives Iceland of an "Icelandic shipping company" within the meaning of the Treaty/MOU; (2) the award to TLI fails to ensure a "viable Icelandic presence" in the trade; (3) the award to TLI undermines both the U.S.-Iceland Bilateral relationship and Ice-

---

[1] As a preliminary matter, the Court will deny Defendants' Motion to Dismiss, largely because the issues raised in it are moot. Defendants first contend that the Court should dismiss those portions of the complaint that relate to the U.S. flag carrier component of the Solicitation, because Eimskip lacks standing to receive a contract award for that share. Now that Van Ommeren is a plaintiff-intervenor, the Court finds that it has standing to challenge the U.S. flag carrier portion of the contract. Therefore this issue is moot. Next, Defendants argue that the Court should dismiss the portion of the complaint that relates to Plaintiffs' protest to the GAO and the decision to override the automatic stay because they became moot when the GAO protest was dismissed. The Court does not need to reach this issue because it will grant Plaintiffs the relief they seek on other grounds. Finally, Defendants' Motion to Dismiss contends that the Court should require Eimskip to join TLI, the successful offeror, as a necessary party pursuant to Federal Rule of Civil Procedure 12(b)(7); this issue also is moot because TLI has intervened.

land's contribution to the vital sea link that binds NATO members; and (4) TLI/TLL's coordinated offer defeats the Treaty/MOU requirement of a single competition between U.S. and Icelandic shipping companies. Van Ommeren joins Eimskip's contention that the awards to TLI and TLL violated the terms of the Treaty and MOU.

Before reaching any conclusion on whether the awards violate the Treaty and MOU, the Court must first determine whether the Treaty and MOU create privately enforceable rights that allow Plaintiffs to assert alleged violations of these agreements. As discussed below, the Court finds that the Treaty and MOU do create such rights and that TLI/TLL's coordinated offer violates the Treaty/MOU requirement of a single competition between United States and Icelandic shipping companies.[2] The Court therefore will order the government to rebid the Solicitation.

Assuming, *arguendo*, that the Treaty and MOU do not confer private rights of action, and that the alleged treaty violations therefore cannot form the basis to support judicial review under the APA, the Court will also discuss whether the contracting officer's responsibility determination should be set aside. Eimskip contends that (1) TLI did not satisfy managerial responsibility criteria because the management responsibility determination was based solely on two letters of recommendation written for Mr. Kjaernested's application to business school and his experience as a line manager for Van Ommeren and (2) TLI is

---

[2] Because the Court finds that the awards to TLL and TLI violate the clear terms of the Treaty and MOU under this theory, it does not need to address Plaintiffs' other arguments that (1) the award to TLI deprives Iceland of an "Icelandic shipping company" within the meaning of the Treaty/MOU; (2) the award to TLI fails to ensure a "viable Icelandic presence" in the trade; and (3) the award to TLI undermines both the U.S.-Iceland Bilateral relationship and Iceland's contribution to the vital sea link that binds NATO members. The Court notes, however, that were it to reach these issues, it appears that there are no meaningful standards by which it could analyze them.

not financially responsible under the solicitation criteria because the contracting officer's determination that TLI was financially responsible was based solely upon a "tentative" $1,000,000 line of credit issued to *TLL* in conjunction with a statement by TLI that any rights and assurances afforded to TLL would also extend to TLI. Based on the information that she had before her, the Court finds that the contracting officer's financial responsibility determination was arbitrary and capricious, and that the award to TLI must be set aside and rebid.[3]

Finally, Van Ommeren contends that the award to TLL also must be set aside as arbitrary and capricious because (1) TLL did not have an irrevocable right to control a U.S.-flag vessel at the time the offers were submitted, as required by the Solicitation; and (2) the Army permitted TLL to charter a foreign-flag vessel to transport U.S.-flag cargo in violation of the Cargo Preference Act of 1904 and the applicable international agreements. The Court finds that the contracting officer's responsibility determination with regard to TLL was arbitrary and capricious because TLL provided insufficient evidence of its "irrevocable right to gain control of the necessary vessels in sufficient time to commence service on 01 May 1998," as required by the Solicitation.[4] Thus, that portion of the contract award must also be rebid.

1. The Treaty and MOU Create Privately Enforceable Rights

A threshold issue in the Court's review of the alleged treaty violation is whether the Treaty and the MOU confer a private right of action. If there is no private right of action, the alleged

---

[3] Because the Court finds the award to TLI arbitrary and capricious based on the financial responsibility determination alone, it does not reach the issue of whether her finding of managerial responsibility was proper.

[4] The Court does not need to reach the post-award performance issue, as it has found the Contracting Officer's award to TLL arbitrary and capricious on other grounds.

treaty violations cannot form the basis to support judicial review under the APA. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942-43 (D.C. Cir. 1988).

The starting point for the private right of action analysis is the fact that this Court has already concluded that the Treaty and MOU do provide a private right of action. *See Rainbow Navigation, Inc. v. Dept. of the Navy*, 686 F.Supp. 354 (D.D.C. 1988) (Greene, J.) ("*Rainbow I*"). Defendant urges the Court to find that *Rainbow I* was either implicitly overruled by the Court of Appeals in *Rainbow Navigation, Inc. v. Dept. of the Navy*, 911 F.2d 787 (D.C. Cir. 1990) ("*Rainbow II*") (holding that the Treaty and MOU did not vest any rights in the current United States flag carrier above the rights of the U.S. flag service as a whole) or was wrongly decided.[5] The Court finds no reason not to follow Judge Greene's well-reasoned conclusions in *Rainbow I* and finds nothing in *Rainbow II* that "implicitly overrules" *Rainbow I* (which was never appealed).

In determining whether a treaty creates private enforcement rights, "courts look to the intent of the signatory parties as manifested by the language of the instrument." *Committee of U.S. Citizens*, 859 F.2d at 937, *quoting Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). Defendants argue that *Committee of U.S. Citizens*, which was decided subsequent to *Rainbow I*, changed the analysis for determining whether a

---

[5] Defendants also argue that this case fits within the criteria of a non-justiciable political question. The Court limits its analysis of the Treaty to the issue of whether, by its plain language, the Treaty requires a single competition an issue that has already been determined by this Court in *Rainbow I*. 686 F.Supp. 354. The Court thereby has limited its analysis to an area traditionally within judicial expertise. The political question concerns raised by Defendants relate to arguments made by Plaintiffs that this Court does not reach (e.g., the meaning of the terms "Icelandic shipping company" and "viable presence in the trade"). Thus, the Court need not address Defendant's political question argument.

treaty confers a private right of action.[6] In *Committee of U.S. Citizens*, the Court of Appeals articulated that the "question whether a particular treaty requires implementing legislation is different from the international law question of whether a treaty 'aims at the immediate creation of rights and duties of private individuals which are enforceable'. . . ." *Id.* at 937, *citing* Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win At Any Price?*, 74 Am. J. Int'l L. 892, 896-97 (1980). Defendants argue that Judge Greene's analysis in *Rainbow I* was incomplete, and therefore faulty, because he limited it to the question of whether the Treaty and MOU were self-executing in the sense that they required no further implementing legislation, rather than making any findings that the Treaty and MOU aim to create enforceable rights. Judge Greene concluded, however, that the Treaty and MOU at issue here were intended to be effective as domestic law *and vested rights in the U.S.-flag carrier* without further legislation. *See Rainbow I*, 686 F.Supp. at 357-58. Without specifically addressing the private right of action issue, *Rainbow II* clarified in whom these rights were vested. *Rainbow II*, 911 F.2d at 801. In both cases, the courts found that the Treaty at issue here creates enforceable rights. Thus, reading *Rainbow I*, *Rainbow II* and *Committee of U.S. Citizens* together, nothing causes this Court to second-

---

[6] *Committee of U.S. Citizens* involved claims by various organizations and certain U.S. citizens living in Nicaragua that the funding of the Contras in Nicaragua violated, *inter alia*, Article 94 of the United Nations Charter, which requires members to comply with decisions of the International Court of Justice ("ICJ") in any case in which such member is a party. The Court of Appeals held that Article 94 does not confer rights on private individuals because, when read in conjunction with the Statute of the ICJ, it was clear to the Court that the ICJ was established to resolve disputes between national governments and was not intended to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government. *Id.* at 938.

guess Judge Green's conclusion in *Rainbow I* that the Treaty and MOU create a private right of action.[7]

2. The Coordinated Offers Violated the Single Competition Requirement

Having found that the Treaty and MOU create privately enforceable rights, the Court concludes that the coordinated offers from TLL and TLI—two entities that are separate yet substantially identical in ownership and management—violate the Treaty and MOU. Such coordination defeats the Treaty/MOU requirement of a *single* competition between U.S. and Icelandic shipping companies whereby the lowest overall bidder would get up to 65 percent of the cargo and the next lowest bidder from the other country would get the remainder. The Treaty does not permit two separate competitions, one among Icelandic shipping companies and one among U.S. flag carriers. The idea of a single competition dictates that TLI and TLL compete against one another. Here, they clearly did not.

The Army contends that the Treaty allows two separate competitions, one to see who will carry the larger portion of the trade and the other to see who will carry the smaller.[8] Defen-

---

[7] Furthermore, pursuant to 5 U.S.C. § 702, potential and actual government contractors have standing to proceed in district court to challenge a procurement under the Administrative Procedure Act. *See Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861-73 (D.C. Cir. 1970).

[8] Under this faulty analysis, the Army was able to conclude that TLI and TLL did not have to compete against each other for the shipping contract. The Army then reasoned that because they were not competitors, TLI and TLL were able to avoid the requirements of the Certificates of Independent Price Determination ("CIPD"), in which the offeror certifies that:

> (1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;

dants rely on the fact that the competition produces two separate awards and that there is no explicit requirement for a "single" competition. Because there are two awards under the Solicitation, the Army posits, there are two *de facto* competitions—Icelandic shipping companies being more competitive for the 65 percent portion of the procurement, and American flag carriers being relegated to the remainder.

The most reasonable reading of the Treaty and MOU, however, leads to the conclusion that they require a single competition *between* U.S. and Icelandic carriers. If the treaty contemplated two competitions, one *among* U.S. carriers and another *among* Icelandic shipping companies, it would have so stated and would not have used "competition" in the singular. Indeed, this Court has already found that a single competition is required. *See Rainbow I*, 686 F. Supp. at 359-60. In *Rainbow I*, the Court found that the Navy's proposal for two separate competitions was contrary to the "straightforward and unambiguous" language of the Treaty and MOU, which require a single competition dealing with 100 percent of the cargo. *Id.* at 356-60. This finding was never appealed. By allowing related offerors from the two countries to submit coordinated bids, the Army violated the "straightforward and unambiguous" requirement of the Treaty and MOU that the bidders compete against one another in a single competition. Because the competition was conducted in violation of the Treaty and MOU, the contract awards must be set aside.

3. The Contracting Officer's Finding of Financial Responsibility for TLI was Arbitrary and Capricious

---

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening . . . unless otherwise required by law.

TLL and TLI certainly must have shared information, especially given the fact that Mr. Kjaernested signed the CIPD for both companies.

Not only did the contract awards to TLL and TLI violate the Treaty and MOU, but they also were arbitrary and capricious in that they failed to meet the requirements stated in the Solicitation. Section M-3 of the Solicitation provides:

> [t]he Government shall require a showing of financial and operational responsibility prior to making an award. The applicable provisions of the FAR [Federal Acquisition Regulation], Subpart 9.1 require that prior to award, an affirmative determination be made by the Contracting Officer that the prospective offeror is responsible and meets the minimum standards specified herein.

Subpart 9.1, in turn, states that in order for an awardee to be financially responsible, it must "have adequate financial resources to perform the contract, or the ability to obtain them." 48 C.F.R. § 9.104-1. Affiliated entities like TLL and TLI (*see* 48 C.F.R. § 19.101) "are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility." *Id.* § 9.104-3(c). Finally, "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. *Id.* § 9.103.

Here, the Contracting Officer's findings of financial responsibility for TLI clearly did not meet the Solicitation and Federal Acquisition Regulation requirements. The sole basis for the Contracting Officer's determination that TLI had adequate financial resources was a letter from the State Bank of Long Island regarding TLL. The letter states that the bank has "tentatively approved a $1 million line of credit for your company, TransAtlantic Lines LLC." Based on this letter, the contracting officer found, "*They* [TLI] have adequate financial resources to perform the contract. This is based on *their* $1 million Line of Credit *issued* by State Bank of Long Island." Contracting Officer's Finding of Responsibility (emphasis added). The Court

agrees with Plaintiffs' argument that "[w]hile contracting officers have discretion, reliance on blind faith as the sole basis for the financial integrity of a start-up company is irrational, arbitrary and capricious." Under the applicable FAR regulations, it was arbitrary and capricious for the Contracting Officer to base her finding that TLI had "adequate financial resources to perform the contract" on a tentative line of credit relating to a separate entity only. Because there was no "information clearly indicating that [TLI] is responsible," the Contracting Officer should have rejected TLI's offer. Her failure to do so renders her decision arbitrary, capricious, and not in accordance with law.[9] See 5 U.S.C. § 706(2)(a). Thus, TLI's portion of the contract award must be rebid.

4. The Contracting Officer had Insufficient Evidence that TLL had Control of U.S.-Flag Vessel

The Court also finds that the Contracting Officer's award of the U.S.-flagship portion of the contract to TLL was arbitrary, capricious, and not in accordance with law. Section L-6.3.3 of the Solicitation contains the following requirement that an offeror present sufficient evidence of the irrevocable right to control a vessel:

> Control of Vessels. No offer will be considered for award which does not include sufficient evidence to establish control or irrevocable right to gain control of the nec-

---

[9] The Court rejects the Government's argument that "the Contracting Officer is strategically situated to judge whether any significant line of credit would even be needed by TLI. After all, TLI was about to receive a lucrative, long term government contract at a price considerably in excess of the government's internal estimate (almost 50%)." Under this line of reasoning, no finding of financial responsibility would ever be necessary because the awardee could rely on the future income of the contract.

> essary vessels in sufficient time to commence service on 01 May 1998.

TLI failed to present such evidence. In support of its bid for the U.S.-flag portion of the contract, TLL submitted letters from four marine companies pledging the availability of vessels. None of the letters, however, specify a definite price, term, or any other conditions of performance—they appear only to establish that TLL has the right to *negotiate* for the irrevocable right to control the vessels described. The letters are insufficiently specific and fail to set forth any consideration. The most specific letter, one from Tidewater Marine, states:

> This is to confirm that TransAtlantic Lines LLC has the option to charter the supply boat Native Dancer subject to the terms and conditions set forth in the Blanket Time Charter and the Exhibit "A" prior to the start of this charter on or about May 1, 1998. The charter is for a minimum of thirty (30) days, with an option to extend for up to five (5) additional months. The maximum charter shall not exceed 180 days. Additional unspecified options shall be mutually negotiated. The purpose of the charter is to fulfill a part of TransAtlantic Lines LLC's obligation to the Joint Traffic Management Office, in the event that the company is awarded the contract.

TLL maintains that although no consideration was received from Tidewater and no price was stated in Tidewater's letter, neither is necessary.[10] It contends that (1) no consideration is necessary because an offer becomes irrevocable when a supplier knows the bidder will rely upon the offer in making its bid; *see Hoel-Steffen Constr. Co. v. United States*, 684 F.2d 843, (Cl. Ct. 1982); and (2) when price is missing, courts regularly read into

---

[10] The documents attached to Tidewater's letter do not include price terms.

contracts that the parties intended commercially reasonable terms.

The Court finds that, while TLL has accurately stated the law, in the circumstances presented here, further negotiations clearly were contemplated by the parties. TLL asks the Court to read far too much into the letters. The Court would have to find that these letters became irrevocable offers by the mere fact that TLL submitted them to the Contracting Officer. The Court finds, however, that TLL's contention that it relied on bids that contained no price terms defies logic. After making that logical leap, the Court would then have to find that it could supply the price term. The only reasonable reading of TLL's submissions is that they establish that TLL had contacted several marine companies and had commenced negotiations with them. This is not enough to satisfy the clear requirement of the Solicitation. The Solicitation requires that any offer that does not establish an "*irrevocable right* to gain control of the necessary vessels" may not be considered.[11] Nothing submitted in TLL's offer could reasonably have led the Contracting Officer to believe that TLL had established that right. Thus, the Court finds that the Contracting Officer abused her discretion when she awarded the U.S.-flagship portion of the contract to TLL, because TLL failed

---

[11] Indeed, the definition of this requirement provided by the Army contracting officer and other JTMO officials at the pre-proposal conference comports with its ordinary meaning:

> . . . effective control . . . would normally be some legal document . . . You either own the vessel or you have a charter for the vessel . . . obviously, we are making a distinction between people who have the ability to effectively control the service, and those people who are simply, [sic] can provide some portion of the service only if some other party provides them with the mechanism to make that happen. . .

Agency Record, Vol. 3, Tab 16 at 55.

to satisfy a requirement of the Solicitation; TLL's portion of the contract must be rebid.

D. Conclusion

The Court finds that the Army must rebid the Solicitation at issue because the coordinated offer from TLI and TLL—two entities that are substantially identical—violates the requirement of the Treaty and MOU that the government conduct a single competition between Icelandic and United States shipping companies. Alternatively, the awards must be set aside because they were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The Contracting Officer abused her discretion in finding that TLI was "financially responsible." Furthermore, she abused her discretion when she accepted TLL's offer notwithstanding the fact that it had failed to satisfy the Solicitation requirement that it establish an irrevocable right to gain control of a vessel to perform the contract. The Court will set aside the awards to TLL and TLI and will order that the Solicitation be rebid. An Order will accompany this Opinion.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

February 3, 1999

APPENDIX C

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ICELAND TO FACILITATE THEIR DEFENSE RELATIONSHIP

The Government of the United States of America and the Government of the Republic of Iceland,

Considering that the Government of the United States of America and the Government of the Republic of Iceland have, by the Defense Agreement Pursuant to the North Atlantic Treaty between the United States of America and the Republic of Iceland, signed on May 5, 1951 ("Defense Agreement"), long maintained arrangements for the use of facilities in Iceland in defense of Iceland and thus also the North Atlantic Treaty area;

Noting the significance of the Defense Agreement in United States-Icelandic relations as well as its unique importance to the North Atlantic Treaty Organization;

Recognizing the need for equitable participation by the United States and Iceland in the burdens and benefits of the Defense Agreement;

Taking into account the historic participation of vessels operating for Icelandic shipping companies and vessels of the United States in the carriage of military cargo between the United States and Iceland in support of the defense arrangements established pursuant to the Defense Agreement;

Recognizing that equitable participation of vessels of both countries in the carriage of cargoes for purposes of the Defense Agreement will strengthen the relations of the Parties and further mutual cooperation in essential areas of defense;

Acknowledging the vital importance of securing adequate ocean transportation services between Iceland and the United States with vessels operating for Icelandic shipping companies

and vessels of the United States during the period of the Defense Agreement;

Reaffirming the contribution of Iceland to the vital sea link that binds the members of the North Atlantic Treaty Organization;

Have agreed as follows:

ARTICLE I

Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to this Article. Any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition shall be determined by agreement between the United States and Iceland.

ARTICLE II

This Treaty shall be ratified by the Government of the United States of America and the Government of the Republic of Iceland in accordance with their respective constitutional processes. It shall enter into force upon the exchange of instruments of ratification at Reykjavik.

ARTICLE III

(1) This Treaty shall remain in force as long as the Defense Agreement or a successor agreement remains in force. Either Party may, at any time, give notice to the other of its intention

to terminate this Treaty. Termination shall take effect 12 months from the date of such notice.

(2) This Treaty shall not preclude the application of measures deemed necessary by either Party to protect its essential security interests.

ARTICLE IV

The provisions of this Treaty and any implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States of America or the Republic of Iceland.

IN WITNESS WHEREOF, the undersigned, being duly authorized for this purpose, have signed this Treaty.

DONE at New York, this 24th day of September, 1986, in duplicate in the English language. The Government of the Republic of Iceland shall provide through diplomatic channels the official translation of the Treaty in the Icelandic language.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:

/S/ GEORGE P. SCHULZ

FOR THE GOVERNMENT OF THE
REPUBLIC OF ICELAND:

/S/ MATTHIAS A. MATHIESEN

APPENDIX D

MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ICELAND IN IMPLEMENTATION OF THE TREATY TO FACILITATE THEIR DEFENSE RELATIONSHIP

The Government of the United States of America and the Government of the Republic of Iceland,

In implementation of the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, signed at New York on September 24, 1986,

Have agreed as follows:

1. Transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of periodic competitions between United States flag carriers and Icelandic shipping companies. Each competition shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country, provided that the lowest bidder shall not be precluded from carrying additional cargo if the next lowest bidder of the other country is unavailable. However, in the event that the next lowest bidder is a United States flag carrier and the United States contracting authority notifies that carrier that it believes that the carrier's bid is unreasonable, the carrier shall submit all data pertinent to its costs of carriage. These data shall be reviewed by the United States contracting authority, which shall award this contract at a fair rate that adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit.

If the next lowest bidder is an Icelandic shipping company and the United States contracting authority believes that its bid is unreasonable, the Parties shall consult with a view to establishing a reasonable rate for the contract.

2. This Memorandum of Understanding shall enter into force on the date of entry into force of the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, signed on September 24, 1986. This Memorandum of Understanding shall remain in force as long as that Treaty remains in force.

3. The Parties shall review on an annual basis the operation of this Memorandum of Understanding with a view to enhancing competition and ensuring the viability of the carriers of both countries operating in the trade. This Memorandum of Understanding may be amended by mutual agreement of the Parties at any time.

IN WITNESS WHEREOF, the undersigned, being duly authorized for this purpose, have signed this Memorandum of Understanding.

DONE at New York, this 24th day of September, 1986, in duplicate in the English language. The Government of the Republic of Iceland shall provide through diplomatic channels the official translation of the Memorandum of Understanding in the Icelandic language.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:

/S/ GEORGE P. SCHULZ

FOR THE GOVERNMENT OF THE
REPUBLIC OF ICELAND:

/S/ MATTHIAS A. MATHIESEN

APPENDIX E

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *September 30, 1986.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, with related Memorandum of Understanding, signed at New York on September 24, 1986. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Treaty.

Iceland is a vital United States ally that provides defense facilities of strategic importance to the defense of the United States and NATO. Recently, a troublesome issue has arisen concerning the transportation of cargoes to the base in Iceland, an issue that could impair the critical United States-Iceland defense relationship. Although for approximately 14 years such cargoes had been transported exclusively by Icelandic shipping companies, under U.S. cargo preference laws they have more recently been carried primarily by a United States carrier, which entered the trade in 1984. The Government of Iceland has taken the position that because Iceland's economy and security depend upon its shipping lines, and because of our mutual defense interests, Icelandic lines should have the opportunity to compete for participation in this trade. Iceland's serious concern about this defense issue has been expressed at the highest levels. This Treaty will resolve this matter and will further the cooperation of the United States and Iceland in essential areas of defense.

The Treaty provides an exception to inconsistent cargo preference law with regard to transportation of cargoes shipped between the United States and Iceland for purposes of the 1951 United States-Iceland Defense Agreement. Under the Treaty, transportation of such cargoes shall be provided by vessels of

the United States and vessels operated by Icelandic shipping companies on the basis of competition pursuant to the Treaty. Any such competition is to result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. The related Memorandum of Understanding provides for implementing arrangements necessary to ensure achievement of these objectives.

Because of the unique circumstances involved, this Treaty does not represent a change in the Administration's general policy concerning cargo preference or a precedent for other agreements.

In view of the important national security Interests furthered by this Treaty, I recommend that the Senate consider this Treaty as soon as possible, and give its advice and consent of ratification of the Treaty, with related Memorandum of Understanding, during this session.

RONALD REAGAN

APPENDIX F

LETTER OF SUBMITTAL

Department of State
WASHINGTON, SEPTEMBER 26, 1986.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship, with related Memorandum of Understanding, signed at New York, September 24, 1986. This Treaty has been negotiated to resolve a vexing issue in our defense relationship with Iceland. That issue concerns transportation of military cargo to and from the base at Keflavik.

Under the 1951 United States-Iceland Defense Agreement Pursuant to the North Atlantic Treaty, the United States and Iceland have long maintained arrangements for the use of facilities in Iceland in defense of Iceland and the North Atlantic Treaty area. For approximately 14 years prior to 1984, vessels operating for Icelandic shipping lines had carried all the cargoes to and from this strategic military base. In May 1984, a newly formed U.S. flag carrier initiated regular service between the United States and Iceland. Since that time, under applicable cargo preference laws, the Department of Defense has shipped cargo for the base at Keflavik on the United States carrier to the extent of its availability. This has sharply reduced the transportation of military cargo on Icelandic shipping lines.

The Government of Iceland has taken the position that because Iceland's economy and security depend upon its shipping lines, and because of our mutual defense interests, Icelandic shipping lines should have the opportunity to compete for participation in this trade. Iceland's serious concern about this situation and the need for an early resolution have been repeat-

edly conveyed to the United States Government at the highest levels. Iceland has indicated that this matter could affect our longer-term defense relationship, including arrangements for operation of the base at Keflavik.

An early NATO member, Iceland is a vital United States ally, and is crucial to the defense of NATO's North Atlantic sea lines of communication. In the early 1950's NATO requested the United States and Iceland to make arrangements for the base in Iceland to provide for the defense of Iceland and the NATO area. Given the extensive Soviet strategic buildup in the Northern Atlantic region, the United States and NATO have an increasingly vital strategic interest in the maintenance of the U.S. base at Keflavik to protect NATO's position in the Norwegian Sea and the North Atlantic.

Practice over time under the 1951 Defense Agreement has involved participation of both vessels of the United States and vessels operating for Icelandic shipping companies in the carriage of military cargo between the United States and Iceland in support of our defense arrangements there. Equitable participation by vessels of both countries in the carriage of such cargoes for purposes of the Defense Agreement will strengthen the relations of the two Parties and further mutual cooperation in essential areas of defense. In view of the unique nature of our defense relationship, and the unparalleled contribution of Iceland to the vital sea link between the members of NATO, the United States undertook negotiations with the Government of Iceland to attempt to resolve the issue.

These negotiations led to the conclusion of the Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship. This Treaty and related Memorandum of Understanding would provide an exception to inconsistent cargo preference law with regard to transportation between the United States and Iceland of cargoes for purposes of the 1951 Defense Agreement. Because of the unique circum-

stances, this limited exception from the cargo preference laws established by the Treaty represents neither a change in the Administration's general policy toward cargo preference nor a precedent for other agreements. Under the Treaty, transportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement will be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies pursuant to the Treaty. The Treaty provides that any such competition shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade. To ensure achievement of these objectives, the Treaty provides that the Parties are to determine, by implementing agreement, the percentage of cargo transported by sea for purposes of the Defense Agreement that is allocated between vessels operated by Icelandic shipping companies and vessels of the United States on the basis of such competition.

As provided by the Treaty, the Parties have entered into an implementing agreement, in the form of the Memorandum of Understanding between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate their Defense Relationship. It provides, more specifically, that each competition under the Treaty shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country provided that the lowest bidder is not prevented from carrying additional cargo if the next lowest bidder of the other country is unavailable. The Memorandum of Understanding also contains provisions to ensure that the rates charged by the next lowest bidders will fall within a reasonable framework. The Memorandum of Understanding will enter into force on the date of entry into force of

the Treaty and remain in force as long as that Treaty remains in force. It provides for annual review by the Parties with a view to enhancing competition and ensuring the viability of the carriers of both countries operating in the trade. It may be amended by mutual agreement of the Parties at any time. This provision is intended to permit the Parties to make any necessary adjustments in the implementing arrangements, effective immediately upon agreement, without need for subsequent ratification or other approval.

While not directly related to the Treaty, during the discussions the Government of Iceland agreed to provide the United States Government with a letter setting forth its willingness to consult with United States authorities concerning other shipping matters relating to the United States and Iceland, including any problems that might be encountered by a United States flag carrier in its ability to compete for commercial cargoes.

The Treaty is to remain in force as long as the 1951 United States-Iceland Defense Agreement remains in force, subject to termination by either Party upon 12 months' notice. Article IV specifically provides that the provisions of the Treaty and implementing arrangements concluded pursuant to Article I shall apply notwithstanding any prior inconsistent law or regulation of the United States or Iceland. Article III also provides that the Treaty will not preclude application of measures deemed necessary by either Party to protect its essential security interests. This provision would apply, for example, in times of war or national security emergency.

Conclusion of this Treaty, with related Memorandum of Understanding, marks a significant development in our attempt to ensure continuation of a close and cooperative defense relationship with Iceland. I join with the Department of Defense and

the Department of Transportation in supporting the Treaty and favor its transmission to the Senate at an early date.

Respectfully submitted,

GEORGE P. SHULTZ.

APPENDIX G

Excerpt from Stenographic Transcript of Sept. 30, 1986 Hearings Before the U.S. Senate Committee on Foreign Relations on the United States-Iceland Treaty on the Carriage of Military Cargo

---

STATEMENT OF THE HONORABLE
EDWARD J. DERWINSKI

THE COUNSELOR
DEPARTMENT OF STATE

TO THE

FOREIGN RELATIONS COMMITTEE
UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

It is an honor and a great pleasure for me to appear before this Committee on behalf of the Department of State to support the Treaty between the United States and the Republic of Iceland to Facilitate Their Defense Relationship, and related Memorandum of Understanding, signed in New York on September 24. The Treaty is being submitted for the Senate's advice and consent to ratification. I will address the political and security rationale for this agreement.

Iceland's location in the far North Atlantic gives it immense strategic importance. It is a crucial part of NATO's northern flank, located close to the Soviet bases on the Kola Peninsula and adjacent to the sea lines of communication between the United States and Europe.

In 1951 the United States and Iceland signed a Defense Agreement pursuant to the North Atlantic Treaty. This agreement was concluded pursuant to a request from NATO that the United States and Iceland make arrangements for the defense of Iceland and the NATO area. It established a framework for the

establishment of a base and the stationing of U.S. military forces in Iceland.

* * * *

The largest defense facility is at Keflavik, headquarters of the IDF. There are several communication and radar facilities at other locations. The United States does not pay any compensation for use of Keflavik or other sites, and although the 1951 Defense Agreement is subject to review by either side at any time, there is no requirement for periodic renewal.

Iceland's political spectrum ranges from conservatives to anti-NATO parties. The present coalition government is the most favorable to U.S. and NATO interests in recent years. As a result, several long-pending matters, such as defense upgrades to the Keflavik base, have been successfully resolved. Nevertheless, there remains important internal opposition to the U.S. role in Iceland in support of NATO objectives.

The 2½-year-long dispute over the carriage of military cargo between the U.S. and Iceland has gradually grown into an important bilateral question that has begun to have a negative impact on our overall relations with Iceland. The issue arose in 1984 when a newly-formed U.S. flag carrier. Rainbow Navigation, entered the military cargo trade to and from Keflavik. For the previous 14 years, no U.S. carrier had operated on this route and all cargo had been carried by Icelandic lines. Based on U.S. cargo preference statutes most of the cargo has been carried by the U.S. flag vessel since 1984. The portion carried by Icelandic lines has dropped sharply. Since Rainbow Navigation has not always been available to move military cargo when required, the remaining Icelandic line has continued to carry between 15%-25% of the cargo.

The Government of Iceland approached the United States Government at the highest levels, requesting that Icelandic ships be permitted to compete for the carriage of cargo to and from

Keflavik. They argued that as an isolated island nation, their economic survival and security depended heavily on their merchant marine. It has become clear over time that if left unresolved this issue could affect our long-term defense relationship with Iceland, cooperation under the 1951 Defense Agreement, and the U.S. forward and deterrent strategy.

Exhaustive efforts to resolve the dispute within the framework of applicable U.S. law and regulatory practice were unsuccessful between 1984-86. In August of this year we determined that the matter could be most effectively resolved through a Treaty. Subsequently, negotiations were held between representatives of the Government of Iceland and the United States Government, including the Departments of State, Defense, Transportation and the National Security Council. These talks were successfully concluded on September 19. The Treaty and a related Memorandum of Understanding were signed by Secretary Shultz and Icelandic Foreign Minister Matthias A. Mathiesen on September 24.

The provisions of the Treaty and Memorandum of Understanding provide a unique exception to inconsistent cargo preference laws with respect to transportation of cargo between the United States and Iceland for purposes of the 1951 Defense Agreement. Under the Treaty, transportation services on the route will be acquired through a competitive bidding process, with provisions to ensure a viable U.S. flag presence as well as the Icelandic line presence in the Keflavik trade. Basically, the lowest bidder will receive up to 65% of the cargo. The lowest bidder of the other country will receive the remainder of the cargo.

* * * *

Our defense and security relationship with Iceland is unique. This treaty does not establish a precedent for the carriage of military cargo for other nations that host American forces. No other exceptions to the cargo preference laws are contemplated.

The Administration is committed to maintaining the integrity of those laws. We view implementation of the Treaty and Memorandum of Understanding as necessary to resolve this problem; it will assure the continued viability of a U.S. flag carrier on this route.

* * * *

In the judgment of the Department of State and the Administration, it is essential to our national security interest to bring this Treaty into force to resolve this issue and to promote and facilitate further cooperation under the Defense Agreement. We therefore, seek early and favorable Senate consideration of the Treaty. I would be pleased now to respond to questions.

Senator Mathias: I personally welcome your statement and the initiative that has been taken. It has been a regular feature of meetings of the North Atlantic Assembly in recent years. We had an extended conversation with the Icelandic delegates on this subject, so I know how very critical this issue is to the Icelanders.

And, as I said earlier, the Foreign Minister, both the present Foreign Minister and his immediate predecessor, have given a lot of their personal attention to it. So I think it is an issue which touches a very critical relationship within the North Atlantic Alliance. As a result of my personal involvement in it, I do not believe you have put too much emphasis on that.

* * * *

The Foreign Ministry and the Foreign Minister of Iceland were very persistent in asking that this matter be addressed directly. We have the standard complication of a number of departments who are concerned, the unions representing the American seamen and the maritime industry. It just took a while for everyone to appreciate the uniqueness and special factors that related to the facilities in Iceland and the need to address this problem.

I think it was just a matter of practical concentration by enough people who were finally alerted to the gravity of the issue.

Senator Mathias: And these factors, of course, include the political situation in Iceland, where this had become a very sore issue.

Mr. Derwinski: Very much so.

Our ambassador had advised us that this had, in effect, become the major domestic political issue in Iceland. Appreciating, as we do, the stability and positive attitude of the Government of Iceland, we felt it most practical for our interests as well as theirs to help alleviate this political pressure problem.

Senator Mathias: And, of course, from our point of view, equally sensitive was the importance of the base at Keflavik.

Mr. Derwinski: Very much so. It is unique.

In fact, that is why this entire treaty is unique, given the uniqueness and special importance of Iceland.

Senator Mathias: I think you and I agree on the importance of this treaty. But is there a downside?

What is going to be the effect on the taxpayers' costs for transporting the cargoes which will supply the base at Keflavik?

Mr. Derwinski: Well, there is no real downside.

The treaty provides for competitive bidding, which is, in fact, a positive development. In addition, as you will know, there is no rental for this base, which is one of the unique features of it. So, what we have here is a treaty which provides for the presence of a U.S. flag carrier, competitive bidding, which is a practical point for the Defense Department and Navy, and, overall, given the variety of interests here, I cannot see anyone who is a loser. I think it is basic plus for everyone involved.

APPENDIX H

99TH CONGRESS — SENATE — EXEC. REPT.
2d Session — 99-27

TREATY BETWEEN THE UNITED STATES AND ICELAND TO FACILITATE THEIR DEFENSE RELATIONSHIP

October 8 (legislative day, October 6), 1986.—
Ordered to be printed

MR. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 99-81]

The Committee on Foreign Relations, to which was referred the treaty between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, with related memorandum of understanding, signed at New York on September 24, 1986, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The treaty would supersede U.S. cargo preference laws for military cargos to Iceland only.

SUMMARY

The treaty would supersede U.S. cargo preference laws, principally the Cargo Preference Act of 1904, for military cargos shipped for purposes of the 1951 United States/Iceland Defense Agreement to and from Iceland only. It provides that such cargos will be open to United States and Icelandic ships on a com-

petitive basis which allows both to maintain a viable presence in the market. An attached memorandum of understanding details how the competitive system would work. Bids would be sought periodically, but the low bidder could not receive more than 65 percent of the cargo to be carried. The remainder would be carried by the lowest bidder from the other country. Consulting procedures are provided in case the next lowest bidder submits a bid which is judged unreasonable.

ENTRY INTO FORCE AND TERMINATION

The treaty would enter into force upon exchange of instruments of ratification. It would remain in force as long as the United States/Iceland Defense Agreement does. Either side could withdraw upon 12 months notice. The memorandum of understanding would remain in force as long as the treaty does, and would be reviewed annually.

COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing, chaired by Senator Mathias, on the treaty on September 30, 1986. The committee considered the treaty at its business meeting on October 8, 1986, and voted 17 to 0 to order it favorably reported to the Senate for its advice and consent. Voting in favor were Senators Lugar, Helms, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Zorinsky, Cranston, Dodd, Eagleton, and Kerry.

BACKGROUND AND COMMITTEE COMMENTS

The committee recognizes the importance of the base at Keflavik, and Iceland's continued participation in NATO and the bilateral defense agreement. The treaty is necessary to maintain these and, therefore, the committee enthusiastically recommends that the Senate advise and consent to ratification. At the same time, the committee emphasizes that the treaty is a unique solution to a unique problem.

Iceland is a small island nation with unique strategic significance. It is an integral part of the NATO's northern flank, located close to the Soviet bases on the Kola Peninsula and adjacent to the sealanes of communication between the United States and Europe. Iceland receives no monetary or other compensation for the strategically important base on its territory at Keflavik.

Shipping is vital to the Icelandic economy and is regarded by Iceland as important to its security. Icelandic shipping companies carried all the military cargo between the United States and Iceland from the late 1960's until 1984, when Rainbow Navigation, Inc., was formed. Rainbow Navigation is a small, nonsubsidized U.S. company chartering a ship from the Maritime Administration and employing American Merchant Mariners. Thereafter, Rainbow transported military cargo between the United States and Keflavik under the 1904 Cargo Preference Act. Iceland's reaction was severe. From 1984 to mid-1986, a number of attempts to bypass the requirements of the 1904 act were tried and failed. In July, the Icelandic Government announced that it would enact a provisional law in late September requiring that all military cargo be subject to competitive bidding open to Icelandic ships. In the absence of competition, United States vessels would, under the proposed Icelandic law, be prohibited from delivering military cargo to Iceland.

Iceland has no cargo preference laws, and insists that some Icelandic vessels should, once again, participate in transporting cargo to Keflavik. The issue has risen to major political proportions in Iceland. Failure to achieve a mutually satisfactory solution could complicate the operation of the vital Keflavik base and lead Iceland to insist on revision or reinterpretation of the 1951 bilateral defense agreement, with inimical consequences for United States and NATO interests.

Consequently, the United States and Iceland have proceeded with the only alternative reasonably available, a treaty to divide

the trade. The treaty would supersede U.S. cargo preference laws, principally the 1904 Cargo Preference Act for this unique situation.

While unique circumstances have created a need for the treaty, the need for continued enforcement of the 1904 Cargo Preference Act is as great. Our merchant marine, the Nation's fourth arm of defense, is essential to achieving the seapower capability our Nation must have at its disposal. The 1904 act is Critical to the development and maintenance of a strong U.S.-flag merchant marine comprised of American flag ships and crewed by U.S. citizens. This is especially true in view of a recent U.S. Navy study which concluded that the shortage of U.S. citizen merchant mariners is serious today, and worsening every year.

Consequently, the committee recommends that the Senate advise and consent to ratification only with the assurances of the Departments of State and Defense that: (1) the treaty would not be understood as, or appear to be a precedent for, similar weakening of the 1904 Cargo Preference Act in other trades; (2) the administration is committed to the overall integrity and vigorous enforcement of the 1904 act; and (3) the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty. The committee received these assurances at its hearing, and recommends advice and consent on that basis only.

The committee understands and expects that the economic viability of the United States-flag service will be maintained just as if the 1904 act were fully in effect in the Iceland trade. The committee further understands that the Department of Defense will withdraw its rulemaking proposal at 51 Fed. Feg. 27016 (July 28, 1986), a proposal which purported to interpret the "excessive or otherwise unreasonable" provision in the 1904 act, but which would have, in effect, given the Secretary of the Navy the discretion to waive the act at any time.

Finally, the committee is convinced that the precedent, if any, created by the treaty is a positive one for the U.S. merchant marine. First, it reconfirms that the 1904 act can only be revised by congressional action. Second, it confirms that if the act is revised by congressional action to address special circumstances, steps must be taken to assure there is no adverse impact on U.S.-flag service. Third, the circumstances underlying the treaty are so unique that the committee cannot envision them arising in any other trade.

TEXT OF RESOLUTION OF RATIFICATION

Resolved (two-thirds of the Senators present concurring therein). That the Senate advise and consent to the ratification of the treaty between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship, with related memorandum of understanding, signed at New York City on September 24, 1986.

APPENDIX I

EMBASSY OF ICELAND

WASHINGTON, D.C.

The Embassy of Iceland presents its compliments to the Department of State of the United States of America and has the honour to present a copy of a Note from the Ministry for Foreign Affairs in Iceland of 28th September, 1998, concerning the Memorandum of Understanding Between the United States of America and the Republic of Iceland In Implementation of the Treaty to Facilitate Their Defense Relationship, *signed* on September 24, 1986.

The Embassy of Iceland avails itself of this opportunity to renew the Department of State of the United States of America the assurances of its highest consideration.

Embassy of Iceland
Washington, D.C.
September 28, 1998
[seal]

The Department of State
of the United States of America
Washington, D.C.

CONFIDENTIAL

The Ministry for Foreign Affairs of Iceland presents its compliments to the Department of State of the United States of America and has the honour to refer to the Treaty Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship and the Memorandum of Understanding Between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate Their Defense Relationship, *signed* on September 24, 1986. The Ministry for Foreign Affairs has further the honour to note that the Government of Iceland has been informed of the decision of the Joint Traffic Management Office, Military Traffic Management Command, Department of the Army, to award to TransAtlantic Lines—Iceland ehf., the Icelandic shipping company portion of the ocean and inland transportation between the U.S. East Coast and Iceland, and to TransAtlantic Lines LLC, the U.S. flag carrier portion of such transportation, under Solicitation Number N00033-97-R-6611, pursuant to the Treaty and Memorandum of Understanding.

The Government of Iceland reaffirms that the Treaty and Memorandum of Understanding have their foundation in the defense relationship with the Government of the United States of America. The Government of Iceland continues to deem the Treaty and Memorandum of Understanding vital to the security of Iceland and, accordingly, continues to attach the highest importance to their being performed in full accordance with their provisions.

The Government of Iceland has concluded, based on available information, that TransAtlantic Lines—Iceland ehf. and TransAtlantic Lines LLC are affiliated companies under common direction, ownership and/or control of Icelandic citizens, and that TransAtlantic Lines—Iceland ehf. lacks the necessary experience, technical capability, financial responsibility, and material connection with Iceland.

The Government of Iceland observes that it is the obligation of the Government of the United States of America under the Treaty and Memorandum of Understanding to conduct bona fide competitions between Icelandic shipping companies and United States flag carriers for awards to which the Treaty and Memorandum of Understanding apply. Accordingly, the Government of Iceland interprets the Treaty and Memorandum of Understanding to preclude awards by the Government of the United States of America of both the Icelandic and United States portions of the trade subject to the Treaty and Memorandum of Understanding to affiliated companies under common direction, ownership and/or control.

The Government of Iceland further observes that the Treaty and Memorandum of Understanding obligate the Government of the United States of America, in its implementation thereof, to ensure, *inter alia*, that Icelandic shipping companies maintain a viable presence in the trade to which the Treaty and Memorandum of Understanding apply, and that this is accomplished in a manner providing for the security interests of Iceland and equitable participation by Iceland in the benefits of the defense Agreement Pursuant to the North Atlantic Treaty between the United States of America and the Republic of Iceland, *signed* on May 5, 1951. Accordingly, the Government of Iceland interprets the Treaty and Memorandum of Understanding to preclude any award of the Icelandic portion of that trade to any company that lacks the experience, technical capability, financial responsibility, and material connection with Iceland that are necessary to ensure, in accordance with the Treaty and Memorandum of Understanding, maintenance of a viable presence of Icelandic shipping companies in that trade providing for the security of Iceland and the equitable participation of Iceland in the benefits of the Defense Agreement, and therefore, is not an Icelandic shipping company for the purposes of the Treaty and Memorandum of Understanding.

The Ministry for Foreign Affairs has the honour to inform the Department of State that the Government of Iceland, based on the foregoing, deems the aforementioned awards to TransAtlantic Lines—Iceland ehf. and TransAtlantic Lines LLC to be inconsistent with the Treaty and Memorandum of Understanding. The Government of Iceland requests that the Government of the United States of America immediately withdraw said awards and conduct this and future solicitations in conformity with the Treaty and Memorandum of Understanding.

The Ministry for Foreign Affairs avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

Ministry for Foreign Affairs
Reykjavik, 28 September 1998
[seal]

The Department of State
of the United States of America
Washington

APPENDIX J

Diplomatic note issued Dec. 30, 1998 by U.S. Department of State

The Department of State refers the Embassy of the Republic of Iceland to its notes dated July 8, 1998, September 28, 1998, October 22, 1998 and December 7, 1998 from the Ministry for Foreign Affairs of Iceland as well as to conversations between representatives of the Embassy of Iceland and State Department staff. All of these communications concern the recent procurement actions by the United States for the carriage of cargo for purposes of the Defense Agreement Pursuant to the North Atlantic Treaty between the United States of America and the Republic of Iceland, signed on May 5, 1951 the "Defense Agreement"). In particular, the Government of Iceland expressed its concern that the recent award of a contract to an Icelandic shipping company was not consistent with the Treaty Between the United States of America and the Republic of Iceland to facilitate their defense Relationship and its related Memorandum of Understanding (hereinafter "Treaty and MOU").

The Government of the United States is unable to agree with the views of the Government of Iceland. The Government of the United States considers its actions in the recent competition and award of the Icelandic military cargo contract are fully consistent with the Treaty and MOU. If the Government of Iceland believes that the terms of the Treaty and MOU no longer fully meet its requirements, the Government of the United States would be pleased to discuss any changes that the Government of Iceland would like to propose.

The concerns expressed by the Government of Iceland arise in the context of the Defense Agreement Pursuant to the North Atlantic Treaty between the United States of America and the Republic of Iceland, signed on May 5, 1951 (the "Defense

Agreement"). As noted in its preamble, the Defense Agreement was intended to "make arrangements for the use of facilities in Iceland in defense of Iceland and thus also the North Atlantic Treaty area." Under that Agreement, the base at Keflavik has been made available to United States forces without monetary or other compensation.

Cargo for that base was carried exclusively by Icelandic shipping companies from the late 1960's until 1984, when a new company was formed in the United States specifically to take advantage of the requirement in U.S. law that U.S. military cargo be transported on U.S.-flag ships when they were available. In mid-1986, the Government of Iceland announced that it would enact a provisional law in late September requiring that all military cargo be subject to competitive bidding open to Icelandic ships. In the absence of competition, United States vessels would, under the proposed Icelandic law, be prohibited from delivering military cargo to Iceland. In the spirit of compromise which has epitomized Icelandic-United States relations, the 1986 Treaty and MOU resulted and were described in a September 26, 1986 note from the Embassy of Iceland as solving an "issue which has plagued us for over two years and threatened to cause lasting damage to the relationship between our two countries." The Note expressed "the satisfaction of the Icelandic Government with this Treaty."

Both the Treaty and its implementing Memorandum of Understanding provide in the operative sections that "[t]ransportation services for cargo transported by sea between Iceland and the United States for purposes of the Defense Agreement shall be provided by vessels of the United States and vessels operated by Icelandic shipping companies on the basis of competition between United States flag carriers and Icelandic shipping companies." The Treaty and the MOU provide for contract awards to be made to "both an Icelandic shipping company and a United States flag carrier," with the MOU providing that "no more than 65 percent of the cargo shall be car-

ried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country." Under its terms, successive contract actions by U.S. military authorities have resulted in awards to Icelandic shipping companies of contracts for 65% of the military cargo carried between the United States and Iceland.

The Government of the United States believes that the Treaty has generally worked well since its entry into force. Although there were informal discussions last year about the possibility of revising the MOU, there have been no steps to alter the text of that document. Until the recent contract competition, the Government of Iceland has not expressed any views regarding the qualifications of particular Icelandic companies nor informed the Government of the United States that it held views that appear to the United States to go beyond the plain meaning of the words themselves.

In its July note, the Government of Iceland states that it "interprets the Treaty and Memorandum of Understanding to preclude operation by Icelandic shipping companies of vessels of the United States" in the military cargo trade. The Government of the United States would like to point out that neither the Treaty nor the MOU deals with the national registry of the vessels that may be used by Icelandic shipping companies. In fact, the Government of the United States understands that Icelandic shipping companies have only rarely used vessels bearing the Icelandic flag to perform this contract. The Treaty and MOU allow this by simply speaking of "vessels operated by Icelandic shipping companies" without further restriction. Neither the Government of the United States nor the Government of Iceland has acted to restrict the flags under which U.S. military cargo is transported pursuant to the contract awarded to an Icelandic shipping company.

In its second and third notes, the Government of Iceland states that it interprets the Treaty and Memorandum of Under-

standing to preclude any award of the Icelandic portion of the trade to TransAtlantic Lines—Iceland ehf. Specifically, in its second note, the Government of Iceland states that "any company that lacks the experience, technical capability, financial responsibility, and material connection with Iceland" is "therefore not an Icelandic shipping company for the purposes of the Treaty and Memorandum of Understanding" because it does not satisfy these four criteria. In its third note, the Embassy of Iceland forwards an enclosed legal memorandum concerning the Facilitation Treaty and MOU. In that memorandum, prepared by counsel for Iceland, it is asserted that the Icelandic company which received the most recent contract award is nothing more than a shell company and that the rules of treaty interpretation as set out in the Vienna Convention of the Law of Treaties require that the term "Icelandic shipping companies" be construed so as to exclude such shell companies.

The Government of the United States notes that none of these four criteria cited by the Government of Iceland to render TransAtlantic Lines—Iceland ehf a non-Icelandic shipping company appears in the text of the Treaty or MOU. The Vienna Convention on the Law of Treaties, to which neither the United States nor the Republic of Iceland is party, is generally recognized as declaratory of many aspects of customary international law regarding treaty interpretation. Article 31 of the Vienna Convention states the rule that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose."

It is the position of the Government of the United States that none of the terms in the Treaty or MOU require recourse to supplementary means of interpretation when the terms of the treaty are plain and unambiguous. The Treaty and MOU speak simply of "Icelandic shipping companies," and the Defense Agreement, which provides the context and purpose of the Treaty and MOU, leaves no doubt as to Iceland's sovereignty,

expressly recognizing the "ultimate authority of Iceland with regard to Icelandic affairs." Thus, Iceland, consistent with its obligations under international law, is of course free to enact specific statutory or regulatory criteria for "Icelandic shipping companies" should it wish to do so (just as the internal law of the United States provides specific criteria for "U.S. flag vessels"). Nothing in the Defense Agreement or the Treaty and MOU precludes adoption as a matter of Icelandic law of the criteria for which the Government of Iceland argues. However, these criteria are not embodied in the Treaty between the parties, where the ordinary meaning of "Icelandic shipping company" is clear.

The Government of the United States further believes that the application of the plain meaning of the terms used in these documents does not lead to a result which is manifestly absurd or unreasonable, but rather to the result, as intended by the parties, that "vessels operating for Icelandic shipping companies" participate in the carriage of military cargo in procurements held by the Government of the United States under its own processes, except where those have been expressly modified by the Treaty or MOU.

In its most recent note, the Government of Iceland transmitted a copy of a letter from the Foreign Minister of Iceland to the United States Secretary of State. In that letter, the Foreign Minister expressed his concern about the ongoing litigation filed by the Icelandic shipping company which lost the contract in the most recent competition. The Government of Iceland, of course, is not a party to the litigation nor would it be bound by its results. The court case, in which the Government of the United States is a defendant, primarily concerns whether the contract award comported with the various statutory and regulatory criteria which the laws of the United States apply to the award of contracts by the United States government. The Icelandic shipping company plaintiff has also alleged that the process of contract award was not in compliance with the Treaty and

MOU. The Government of the United States expects to address any treaty issues, should the court determine to entertain them, along the lines of its views as presented in this note.

Lastly, in discussions held between representatives of the Government of Iceland and the Government of the United States, the Government of Iceland expressed its concern that there had been no effective competition because of the relationship between two of the bidders. The Government of the United States, however, followed its own contracting processes in this procurement and believes that the goal of competition was indeed met. There were six offers received for the contract award, two form American-flag carriers, three from Icelandic shipping companies, and one joint venture between one of the American-flag carriers and one Icelandic shipping company. The joint venture was not actively considered for contract award.

The Government of the United States followed its own contracting rules during the course of this procurement. Under those standards, different bids submitted by divisions of the same corporation or different bids signed by the same person for two companies is permissible and does not constitute collusive bidding when, as was the case here, there is no evidence of an attempt to eliminate competition from other bidders. This standard applies even in cases where two affiliated bidders are jointly preparing and submitting bids for the same requirement. In this case, however, the two companies whose relationship is the cause of concern for the Government of Iceland were not competing to fill the same contract requirement. Rather, the Iceland company submitted a proposal for the 65% share while the U.S.-flag company submitted one for the 35% share. Those two offers varied significantly from each other with respect to both their technical aspects and pricing. The official responsible for conducting the competition and making the award filed a report (made available to the Icelandic shipping company that has filed the litigation now being heard in the courts of the

United States) stating that "the Icelandic shipping companies submitted the lowest, acceptable prices, and that only Icelandic shipping company offers provided vessels capable of meeting the minimum operational capacity requirements stated in the solicitation for the 65% portion" of the cargo. Thus it was determined that the Icelandic portion of the cargo carriage would be 65% and the contract was awarded to the Icelandic shipping company which had the lowest price. A similar process took place for the portion of the cargo which had to be transported on U.S.-flag vessels.

Since the portion of the cargo trade which would be reserved for Icelandic interests was determined on the basis of competition between offers submitted by entities from each country, it is the view of the United States that any relationship between Icelandic companies and companies operating U.S.-flag vessels was and is irrelevant to the fact that there was full, vigorous, and open competition in full compliance with the Treaty and MOU.

The Government of the United States trusts the foregoing is responsive to the concerns expressed by the Government of Iceland.

Department of State, /s/ GW

Washington, December 30, 1998.

APPENDIX K

Excerpts from Aug. 18, 1999 Brief for Federal Appellees to the U.S. Court of Appeals for the District of Columbia Circuit in *Iceland Steamship Co. v. U.S. Dep't of the Army*, No. 99-5113

* * * *

Introduction

* * * *

* * * Although this Court need not reach the Treaty issues in deciding this appeal, if it reaches those issues, the Court should have before it the Executive Branch's interpretation of that Treaty.

In interpreting that Treaty, this Court should properly defer to the Executive's reasonable interpretation of that Treaty, as evidenced in a December, 1998 Diplomatic Note. JA 128-35. For a variety of reasons, including a desire to preserve as much diplomatic confidentiality as possible, Federal Appellees determined not to put the December 30, 1998 Diplomatic Note into the record prior to the District Court's decision. But appellants TLI and TLL apparently obtained a copy of that Note and included it as an exhibit to their memorandum in support of their motion for stay pending appeal filed in the District Court on March 31, 1999. JA 13. Because the Note is now part of the record, this court should defer to the Note on the issues of Treaty interpretation.

* * * *

APPENDIX L

Jan. 12, 1990 Reply Brief of Federal Appellants to the U.S. Court of Appeals for the District of Columbia Circuit in *Rainbow Navigation, Inc. v. Dep't of the Navy*, Nos. 89-5019, 89-5020

* * * *

* * * Rather, as we pointed out (Gov't Br. 19-20), the Treaty simply provides for "competition" *between* "United States flag carriers and Icelandic shipping companies" for the right to transport military cargo to Iceland. Treaty, Art. I. While the Treaty does contain what Rainbow views as the "crucial language" (Br. 27, 33) of "ensur[ing] * * * a viable presence in the trade," it explicitly provides that assurance to "*both* United States flag carrier *and* Icelandic shipping companies." Treaty, Art. I (emphasis added). In short, as its preamble states, the Treaty is intended to provide "equitable participation of vessels of *both countries* in the carriage of [Iceland] cargoes." *Id.*, Preamble (emphasis added). Indeed, as Eimskip notes, a motivating purpose of the Treaty was to "restore opportunities for Icelandic carriers" to fully compete in the Iceland trade, which opportunities had been foreclosed by application of the Cargo Preference Act. Eimskip Br. 20. By providing such an opportunity for "equitable participation" by a fair "competition," however, neither the Executive Branch nor the Senate agreed to any "deal" to hand over the "lion's share" of the trade to the Icelandic carriers.[1] Rainbow's claim to that effect—the crux of its argument—is plainly without merit.

---

[1] While the government noted in its opening brief that the economics of the trade probably favored the Icelandic carriers in a head-to-head competition (Gov't Br. 39n.34 *citing Government Agency Compliance With Cargo Preference Laws: Hearings Before The Subcommittee on Merchant Marine Of The House Merchant Marine And Fisheries Committee*, 99th Cong., 2d Sess. 113 (1986) ("House Hearings")), such an observation in no way con-

Similarly, while the MOU spells out certain details of the "competition" required under the Treaty, it makes clear that the 65% portion goes to the "lowest bidder" (*either* U.S.-flag *or* Icelandic) with the 35% portion to the "next lowest bidder of the other country" (again, *either* U.S.-flag *or* Icelandic, depending upon the country of the "lowest bidder"). MOU ¶ 1. Contrary to Rainbow's submission (Br. 34), the specific language of the MOU *does* merely establish "a duty to see that the military cargo is split on a 65%/35% basis between the two flags." Neither the language of the Treaty or the MOU, however, supports the conclusion that the Icelandic companies *must* receive the "lion's share"/65% portion of the trade to the detriment of the successful U.S.-flag bidder. The single competition under the Treaty is just that -- a *competition* based on bidded rates for carriage.

* * * *

---

cedes the 65% "lion's share" of the trade to the Icelandic carriers in perpetuity, as Rainbow claims. *See* Rainbow Br. 13, 34. Indeed, as the authority cited by the government explains, "if a U.S. operator can underbid all [the] Icelandic carriers," it will be entitled to the "65 percent" portion of the trade and "[i]f the U.S. operator fails to submit the lowest bid, the Icelandic carrier will receive 65 percent of the cargo." House Hearings 113-14. In short, as discussed in the text, the Treaty establishes a *competition* for the trade—not guaranteed allocations.

APPENDIX M

Excerpt from Transcript of Motions Hearing Before the Honorable Thomas F. Hogan, United States District Judge, Jan. 6, 1999, in *Iceland Steamship Co. v. U.S. Dep't of the Army*, Docket No. CA 98-2631

* * * *

[23] THE COURT: You don't see the treaty says competition between different—between Iceland and the United States—the purpose of the treaty was to have Icelandic and a viable trade in this area. Competition between the two companies, carriers to obtain this contract and not some competition among some U.S. carriers and Icelandic carriers. You don't see the difference?

MR. SMITH: Well, I understand what you're saying and I guess there is a difference, but the fact of the matter is, when they drafted the treaty, this was a thorn that they didn't think through. How is it possible when you have two awards that you're not going to have two de facto competitions? I mean, we're not saying we conducted two competitions. The Navy tried to do that and was told no. I don't know any other way the contracting officer could have [24] done it. How are—there's no requirement that anybody bid on any particular percentage. The contracting officer could not say, well, you must bid on 65 percent. So—

THE COURT: I see concerns in how you work out this treaty but, again, diplomats and the executive branch try to resolve and properly work out a treaty and memorandum of understanding. It's the language of the treaty that has caused some problems.

* * * *

APPENDIX N

Excerpt from Transcript of Motions Hearing Before the Honorable Thomas F. Hogan, United States District Judge, Feb. 12, 1999, in *Iceland Steamship Co. v. US. Dep't of the Army*, Docket No. CA 98-2631

* * * *

MR. SMITH: Let me address that briefly. I mean, without talking beyond the record--I guess talking beyond the record, there certainly has been diplomatic note back to the Government of Iceland. We have decided not to include it in the record, because we felt that was not truly part of the record.

THE COURT: I don't think it is.

MR. SMITH: It is not.

* * * *

APPENDIX O

Excerpt from Solicitation No. N00033-97R6611, from Joint Appendix Vol. I at JA 109, in *Iceland Steamship Co. v. U.S. Dep't of the Army* U.S. Court of Appeals for the District of Columbia Circuit, No. 99-5088

* * * *

SECTION M- EVALUATION FACTORS FOR AWARD

M-1 BASIS FOR AWARD

M-1-1. Award Allocation. Pursuant to the Treaty and its implementing Memorandum of Understanding (MOU), two separate contracts will be awarded. The first award, not to exceed 65% of the cargo moving in the trade, will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors (i.e. lowest priced technically acceptable), responsible offeror, i.e., the Icelandic shipping company or U.S. flag carrier whose proposal is evaluated, as specified below, as offering the lowest aggregate price to the Government. The second award, for the remainder of the cargo, will be made on the basis of the next lowest evaluated price of proposals meeting or exceeding the acceptability standards for non cost factors which is determined by the Contracting Officer to be responsible. The lowest priced offeror, which is awarded a contract, shall not be precluded from carrying additional cargo if the next lowest priced awardee of the other country is unavailable. Further details regarding cargo allocation are addressed in Section H-4.

* * * – *

APPENDIX P

Letters dated Aug 9, 1998 from Gudmundur Kjaernested to Joint Traffic Management Office, from record in *Iceland Steamship Co. v. U.S. Dep't of the Army*, U.S. Court of Appeals for the District of Columbia Circuit, No. 99-5088

TRANSATLANTIC LINES LLC

169 Mason St., Suite 3B
Greenwich, CT 06830
Tel: 203-625-5514
Fax: 203-863-9354
E-mail: gudmundur_kjaernested@msn.com

August 9, 1998

Joint Traffic Management Office
Ms. Judith Rubinstein
Fax: 703-681-5621/5146
1 Page

RE: Corporate Structure

Dear Ms. Rubinstein,

This is to inform you that the structure of TransAtlantic Lines LLC is as follows: American Automar Inc. (AAI) has a 51% ownership interest and TransAtlantic Lines Holdings Inc. (TAL Holdings) has a 49% ownership interest in TAL.

a) President is Brandon C. Rose, a citizen of the United States
b) Chairman of the board of directors Mr. Joseph B. Haver, a citizens of the United States
c) The board of directors consists of four people: Mr. Brandon C. Rose, Mr. Joseph B. Haver and Mr. R. Bruce Carleton, all citizens of the United States and Mr. Gudmundur Kjaernested a citizen of Iceland.

If you have any other questions please feel free to give me a call.

Sincerely Yours,

/s/ Gudmundur Kjaernested
GUDMUNDUR KJAERNESTED
Vice President

TRANSATLANTIC LINES ICELAND EHF.

Prastarnes 16

210 Gardabae, Iceland
Tel: 011-354-564-2170
Fax: 011-354-564-2171
E-mail: gudmundur_kjaernested@msn.com

August 9, 1998

Joint Traffic Management Office
Ms. Judith Rubinstcin
Fax: 703-681-5621/5146
1 Page

RE: Corporate Structure

Dear Ms. Rubinstein,

This is to inform you that the structure of TransAtlantic Lines—Iceland ehf. is as follows: American Automar Inc. (AAI) is 50% shareholder, Brandon C. Rose is 24.5% shareholder Gudmundur Kjaernested is 24.5% shareholder and Simon Kjaernested is 1% shareholder.

a) President is Gudmundur Kjaernested, a citizen of Iceland

b) Chairman of the board of directors Mr. Simon Kjaernested, a citizens of Iceland

c) Manager is Mr. Simon Kjaernested, a citizens of Iceland

d) The board of directors consists of two people: Mr. Brandon C. Rose a citizen of the United States and Mr. Simon Kjaernested a citizen of Iceland.

If you have any other questions please feel free to give me a call.

Sincerely Yours,

/s/ Gudmundur Kjaernested
GUDMUNDUR KJAERNESTED
President

APPENDIX Q

Letter dated Mar. 15, 1999 from U.S. Senator Robert G. Torricelli to the Honorable Janet Reno, U.S. Attorney General

---

UNITED STATES SENATE
113 Dirksen Senate Office Building
Washington, DC 20510-3003
(202) 224-3224

March 15, 1999

The Honorable Janet Reno
United States Attorney General
Department of Justice
Main Justice Building, Room 5111
10th and Constitution Avenue
Washington, DC 20530

Dear Attorney General Reno:

I am writing to request that the Department of Justice appeal the decision handed down by the U.S. District Court for the District of Columbia (Hogan, J.) on February 3, 1999 concerning two contracts for the ocean carriage of military cargo between the United States and the U.S. Air Force Base in Kefjlavik Iceland. I enclose a copy of that decision for your convenience.

As you may know, ocean shipments of U.S. military cargo are generally required to be carried by U.S.-flag vessels. However, the defense treaty between the United States and Iceland and a related Memorandum of Understanding, require the U.S. government to accept bids from both Icelandic shipping companies and U.S.-flag carriers to carry U.S. military cargo between our two nations. The treaty further requires the government to

award no more than 65 percent of the cargo to the lowest bidder of either country, and at least 35 percent of the cargo to the next lowest bidder of the other country. This Treaty thus contemplates the award of two contracts: one to an Icelandic shipping company and one to a United States-flag carrier.

The solicitation at issue in this case was conducted by the Army's Joint Traffic Management Command. Five companies submitted offers: three Icelandic shipping companies and two U.S.-flag carriers. All offerors were given a fair opportunity to submit their best and lowest offers. After review of the offers, the Army awarded the 65 percent contract to TransAtlantic Lines—Iceland (TLI), an Icelandic Shipping company whose offer was substantially lower than that of the next lowest bidder, The Icelandic Steamship Company Ltd. (Eimskip). The Army then awarded the 35 percent contract to the next lowest bidder of the other country, TransAtlantic Lines L.L.C. (TLL), a U.S.-flag carrier, whose offer was substantially lower than that of the next lowest bidder, Van Ommeren Shipping. While TLI and TLL share some common ownership and management, TLI is clearly an Icelandic shipping company, and TLL is organized under the law of Delaware and is clearly a U.S.-flag carrier.

Both Eimskip and Van Ommeren sued the Army. The district court initially denied Eimskip's motion for a preliminary injunction, finding that Eimskip did not have a likelihood of success on the merits. However, in its February 3rd decision the court did a complete about-face and "set aside" the Army's award of the contracts to TLL and TLI. IN its Memorandum Opinion, the court held that the "most reasonable reading of the Treaty and MOU" prohibited the offers from TLL and TLI because these two companies did not compete with one another.

I am very concerned that the court's decision, if left standing, may have a significant impact on U.S. foreign and military policy. First, the court's opinion quotes extensively from a diplomatic note sent by the Iceland Foreign Ministry to the State

Department, setting forth the Icelandic government's view that the Treaty and MOU prohibit the U.S. from awarding these contracts to an Icelandic shipping company and a U.S.-flag carrier if both are affiliated with one another. The United States, in this litigation and in a reply to Iceland's diplomatic note, has interpreted the Treaty and MOU differently.

This is not a case where private parties are litigating over the meaning of an international treaty that explicitly governs the rights and liabilities of private parties. This case involves a direct dispute between two sovereign nations over the meaning of a treaty that concerns how the U.S. government will procure transportation services. This is the very type of international dispute which the Constitution and the courts commit solely to the executive branch of our government. Indeed, the MOU expressly provides a mechanism for Iceland and the United States to review and amend the MOU. The President and Secretary of State cannot formulate and implement the foreign policy of this country in an effective manner if the governments of the world, or their citizens, can go into a district court and convince a judge that U.S. foreign policy is wrong.

The Supreme Court has also made clear in numerous cases that the government's interpretation of an international treaty is entitled to substantial deference. Here, the court gave no deference whatsoever to the government's interpretation of the Treaty and MOU. Had it done so, it would have upheld the awards, because the court's holding that its interpretation is the "most reasonable" necessarily means that the government's interpretation was unreasonable. Again, the President and the Secretary of State cannot possibly formulate and implement the foreign policy of this country if federal district court judges have wide-ranging authority to decide whether that policy is correct.

In short, the district Court's decision could have a significant impact on the Government's ability to implement United States foreign policy, and the Government's ability to enter into favor-

able contracts for products and services. Accordingly, I request that the Justice Department appeal the district court's decision.

Thank you for considering this important request. Please feel free to contact me directly with any questions or concerns.

Sincerely,

/s/ Robert G. Torricelli
ROBERT G. TORRICELLI
United States Senator

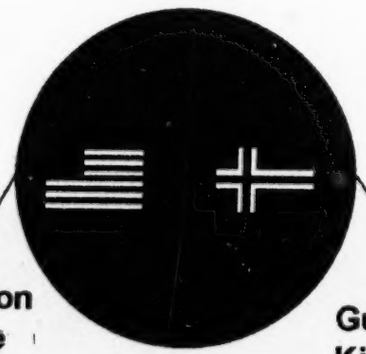
cc: Secretary Albright
cc: Secretary Cohen
cc: Secretary Slater

TLI/TLL Ownership

Initial Joint Venture Rejected By JTMO

March 1998

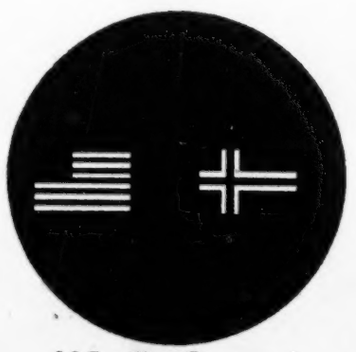
TLI



Brandon Rose

Gudmundur Kjaernested

TLL

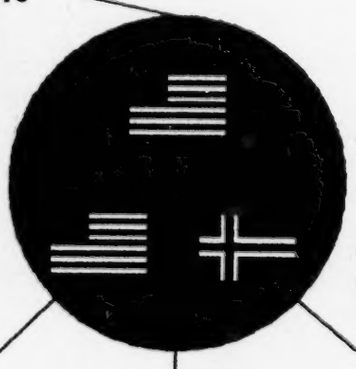


Wholly Owned Subsidiary of TLI

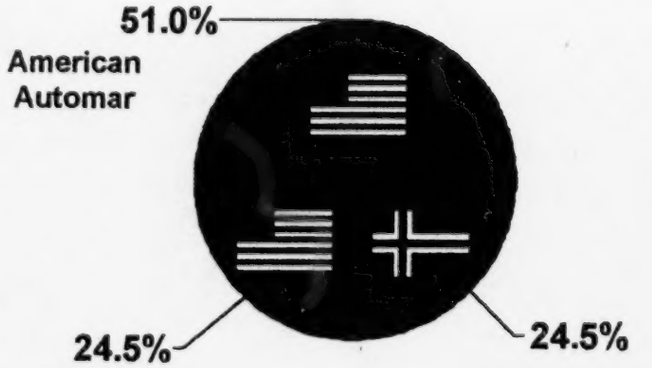
Awardees

September 1998

TLI



TLL



***Through TAL Holdings which is owned equally by Brandon Rose and Gudmundur Kjaernested**